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A General Framework for Analyzing Choice-of-Law Problems in Air Crash Litigation

John B. Austin

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A GENERAL FRAMEWORK FOR ANALYZING CHOICE-OF-LAW PROBLEMS IN AIR CRASH LITIGATION

JOHN B. AUSTIN*

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* John Austin is a Senior Associate in the Chicago law firm Adler, Kaplan & Begy, which specializes in aviation litigation. Mr. Austin holds an A.B. from Harvard College (1956), an LL.B. from Harvard Law School (1960), an M.M. from Roosevelt University (1973), and a Ph.D from the University of Chicago (1981).

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I. INTRODUCTION

THIS ARTICLE had its genesis in a lawyer's nightmare, namely, the possibility of facing the daunting array of choice-of-law problems, which might arise in litigation following a major air catastrophe. For example, in *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*,¹ the Multidistrict Litigation court was confronted with one-hundred-eighteen wrongful death actions which were originally filed in six states, including plaintiffs and decedents residing in ten states, as well as Puerto Rico, Japan, the Netherlands, and Saudi Arabia. The complaints alleged causes of action for wrongful death and survival based on negligence and strict liability and sought compensatory and punitive damages.² Crashes leaving survivors are likely to raise additional causes of action such as loss of society, loss of consortium, and battery. In addition, issues may arise involving such damage-measuring or damage-limiting questions as prejudgment interest; measurement of compensatory damages (that is, present value and, in death cases, deduction of projected taxes, deduction of projected self-support costs, hedonic damages, and damages for pre-impact fear); as well as questions concerning the availability and limitations upon punitive damages and application of the Warsaw Convention.³

Visions of the simultaneous appearance of these choice of law problems—and perhaps others mercifully not dreamed of—prompted the preparation of this article, which has two purposes: 1) to develop approaches to the solution of some specific choice issues which may arise, and in the process, 2) to illustrate modes of analysis that

¹ 644 F.2d 594 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981) [hereinafter *Air Crash Chicago*].

² *Id.* at 604.

³ This article does not treat any aspect of the Warsaw Convention. The reader is referred to LAWRENCE B. GOLDBIRSCHE, *THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK* (1988); RENÉ H. MANKIEWICZ, *THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER* (1981); GEORGETTE MILLER, *LIABILITY IN INTERNATIONAL AIR TRANSPORT: THE WARSAW SYSTEM IN MUNICIPAL COURTS* (1977).

might be helpful in the solution of other choice issues. Although written from the point of view of an airline defending such litigation, the approach to parsing choice-of-law problems may be helpful in general. Certainly, many of the suggestions may be applicable to the defense of other kinds of businesses, particularly those operating on a national scale.⁴

The aim throughout the article is to resist the temptation to play games with this sometimes convoluted and frustrating subject and to develop stances which are analytically defensible within the confines of present choice of law rules.⁵ With respect to compensatory damages, for example, the sensible choice of the injured person's domiciliary law can be either advantageous or disadvantageous to the airline. Counsel would invite trouble by attempting a piecemeal approach seeking the most advantageous law in regard to each individual plaintiff.

The material in the article is grounded upon a basic categorization of choice of law problems and principles distilled from existing precedent. With the exception of punitive and compensatory damages, the approaches to particular problems do not purport to constitute traditional legal arguments based upon research of existing authority. Instead, they attempt to illustrate how established, basic principles may be used to develop logical choice of law solutions. In any case, the practitioner will have to thoroughly research the particular problem at hand.

⁴ Of course, in non-aviation cases, the place of the injury may not be fortuitous, as it frequently is in air crashes. This difference can be crucial, particularly in regard to issues concerning conduct. See *infra* notes 102-28 and accompanying text (discussion of punitive damages).

⁵ In *Air Crash Chicago* Judge Sprecher lamented the choice-of-law complications necessitated by the fact that "[a]irline corporations and airplane manufacturers are subject to uniform federal regulation in almost every aspect of their operations, except their liability in tort." *Air Crash Chicago*, 644 F.2d at 632. As Judge Sprecher noted, however, "it is up to Congress, and not the courts, to create the needed uniform law." *Id.* at 633. There is no shortage of commentary on the existing insecurity and waste inherent in present choice-of-law rules. See, e.g., Michael H. Gottesman, *Draining The Dismal Swamp: The Case For Federal Choice Of Law Statutes*, 80 GEO. L.J. 1 (1991).

For the sake of manageability, this article assumes litigation in federal court based upon the principles of the "most significant relationship" test of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS.⁶ The springboard for the discussions of the various topics is *Air Crash Chicago*.⁷ Anyone confronted with choice of law problems in tort litigation should digest this case thoroughly because it exemplifies principles that are generally applicable beyond the punitive-damages issue in the case.

II. BASIC PRINCIPLES: A BROAD DESCRIPTION OF AN APPROACH TO CHOICE PROBLEMS

A. CHOICE-OF-LAW RULE APPLIED IN FEDERAL DIVERSITY CASES

In diversity actions, federal courts employ the choice-of-law rules of the forum state.⁸

B. CHOICE-OF-LAW RULE IN MULTI-DISTRICT LITIGATION

When a case is transferred from one federal court to another—for example, from one of a number of transferor courts to a single Multidistrict Litigation (MDL) court—the transferee court must apply the choice of law rules of the state where the transferor court sits.⁹

C. RULE OF DEFAULT

In the Seventh Circuit, it is established that when parties to a diversity suit fail to specify that the forum state's choice-of-law rules require the application of another state's substantive law, the forum state's own substantive law applies.¹⁰ The law of the circuit in which a particular case is filed should be researched in regard to this waiver

⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971) [hereinafter RESTATEMENT].

⁷ 644 F.2d 594 (7th Cir. 1981).

⁸ *Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487, 496 (1941).

⁹ *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964); *Air Crash Chicago*, 644 F.2d at 610.

¹⁰ *In re Iowa R.R.*, 840 F.2d 535, 543 (7th Cir.), *cert. denied*, 488 U.S. 899 (1988);

argument.¹¹ If the law of a state other than the forum is asserted, the choice-of-law inquiry must begin with the identification and understanding of the forum state's choice-of-law rule.¹²

D. CHOICE-OF-LAW STANDARDS IN GENERAL

There are two general categories of choice rules: 1) those that simply apply the substantive law of a particular place, for example, the place of the accident or of the forum and 2) those that require some kind of analysis of the interests and policies of the jurisdictions that are connected to the parties, the conduct and the occurrence.

1. *Lex Loci Delicti and Lex Fori*

Although they are in a distinct minority, some states continue to adhere to the old *lex loci delicti* as their choice rule.¹³ The *lex loci* may or may not be advantageous to a defending airline.¹⁴ When the forum state's *lex loci* rule is

National Ass'n of Sporting Goods Wholesalers, Inc. v. F.T.L. Mktg. Corp., 779 F.2d 1281, 1284-85 (7th Cir. 1985).

¹¹ See, e.g., Holloway v. Heci Exploration Co. Employees' Profit Sharing Plan, 76 B.R. 563, 572 (N.D. Tex. 1987), *aff'd*, 862 F.2d 513 (5th Cir. 1988) (adopting a similar rule).

¹² This inquiry of course will be unnecessary in regard to actions based upon federal law. For example, many states' Deceptive Trade Practices statutes incorporate federal law.

All of the states' choice-of-law rules as of 1990, as well as their rules concerning several other issues (for example, rules governing wrongful death actions, and survival actions, contribution, and indemnity) are compiled in 1 DEFENSE RESEARCH INST., A COMPENDIUM OF STATE LAWS FOR AVIATION PRACTITIONERS (1990) (a special publication of the Defense Research Institute, 750 North Lake Shore Drive, Suite 500, Chicago Illinois 60611).

¹³ See, e.g., Spencer v. Malone Freight Lines, 298 So. 2d 20, 22 (Ala. 1974); Risdon Enters., Inc. v. Colemill Enters., Inc., 324 S.E.2d 738, 740 (Ga. Ct. App. 1984) (declining to depart from *lex loci* in airplane crash case); Hauch v. Connor, 453 A.2d 1207, 1209 (Md. App. 1983).

¹⁴ For example, Iowa recognizes a cause of action for a deceased tort victim's pain and suffering, as well as wrongful death, and also permits the assessment of punitive damages in both survival and wrongful death aspects of Iowa Code § 611.20. See Bernger v. Frink, 314 N.W.2d 388, 390 (Iowa 1982); Cardamon v. Iowa Lutheran Hosp., 128 N.W.2d 226, 235 (Iowa 1964). In contrast, Colorado does not permit damages for pain and suffering in survival actions. COLO. REV. STAT. § 13-20-101 (1990). In Illinois, compensation in a wrongful death action covers only pecuniary loss and not the decedent's pain and suffering. Thiele v.

unfavorable to the airline, the airlines should look for exceptions that the state may recognize to the mechanical application of the accident state's rules.¹⁵ Laws resulting from the mechanical application of *lex fori* should be similarly explored.¹⁶ Because such qualifications would necessarily be based upon the identification of other state's policies, which the accident or forum state's law would frustrate, the choice-of-law discussions below will aid in such an attempt. If a plaintiff who benefits from the law of either the state of the accident or the state of the forum also resides in that state, however, it will be difficult indeed to escape the application of the accident or forum state's law.

2. Jurisdictions Requiring Analysis of Interests

The existing and potential forums that do not apply *lex loci delicti* or *lex fori* employ a variety of choice rules, which depend upon some kind of inquiry into the interests of the jurisdictions connected to the parties, the conduct, and the accident.¹⁷ The most prevalent interest-analysis test is the Restatement's "most significant relationship

Ortiz, 520 N.E.2d 881, 887 (Ill. App. Ct. 1988). Also, Illinois does not permit punitive damages in either wrongful death or survival actions. *Ballweg v. City of Springfield*, 499 N.E.2d 1373, 1377 (Ill. 1986); *Froud v. Celotex Corp.*, 456 N.E.2d 131, 136-37 (Ill. 1983).

¹⁵ See generally *Sweeney v. Sweeney*, 262 N.W.2d 625, 628 (Mich. 1978) (declining to apply the law of Ohio, where the accident occurred, because Ohio's law would have violated Michigan's public policy by holding the parent immune from the child's suit for injuries suffered in an auto accident); *Paul v. Nat'l Life*, 352 S.E.2d 550 (W. Va. 1986) (refusing to apply the guest passenger statute of Indiana, where the accident occurred).

¹⁶ Any case that speaks in terms of *lex fori* should be carefully examined for the likelihood that the application of the forum's law is in reality the result of an interest-analysis rather than an application of a state's designated choice rule, as such. See, e.g., *Sexton v. Ryder Truck Rental, Inc.*, 320 N.W.2d 843 (Mich. 1982) (decided by plurality). In this case, Justice Williams stated, "where Michigan residents or corporations doing business in Michigan are involved in accidents in another state and appear as plaintiffs and defendants in Michigan courts, the courts will apply the *lex fori*, not the *lex loci delicti*, and we do so without reference to any particular state policy." *Id.* at 854; see also *Olmstead v. Anderson*, 400 N.W.2d 292, 299 (Mich. 1987).

¹⁷ For example, courts may employ the "most significant relationship" test, some form of "governmental interest analysis," or "Leflar's factors."

test.”¹⁸ This article attempts to provide a theoretical background, which will not only serve as a general approach to many actual and potential choice problems, but also illustrate ways in which reasoning already employed in caselaw may be extended advantageously to completely different choice issues. The discussion is couched in the terms of the Restatement’s “most significant relationship” test, but its approach to the definition of interests will be applicable to other interest tests as well.¹⁹ The attorney must, of course, master those inflections that particular jurisdictions have imposed upon the general formula.

E. RESTATEMENT GUIDELINES

Two of the Restatement’s sections will guide any Restatement conflicts of law analysis: Sections 6 and 145.²⁰

1. Section 6

Section 6 articulates general principles.²¹ Section 6(1) acknowledges potential constitutional concerns created by a court’s application of the statutory directive of its

¹⁸ RESTATEMENT, *supra* note 6, § 145.

¹⁹ As the court said in *Air Crash Chicago*: “We emphasize at the outset that the tests to be used, although containing significant differences, mandate an analytic inquiry which is basically the same.” *Air Crash Chicago*, 644 F.2d 594, 610 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981).

²⁰ RESTATEMENT, *supra* note 6, §§ 6, 145.

²¹ Restatement § 6 provides the following choice of law principles:

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
 - (a) the needs of the interstate and international systems,
 - (b) the relevant policies of the forum,
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - (d) the protection of justified expectations,
 - (e) the basic policies underlying the particular field of law,
 - (f) certainty, predictability and uniformity of result, and
 - (g) ease in the determination and application of the law to be applied.

Id. § 6.

own state on choice of law.²² Attorneys should watch for such possibilities. For example, due process surely requires at least some rationale for the forum state to permit liability—derived either from the forum state's specific interest in the accident itself, by way of a party's residency, the center of relationship, or some activity connected to the accident, or from the forum state's adoption of a choice rule which at least acknowledges the legitimate interests of other states.²³ This concept might be useful in regard to choice problems in which the laws of all the most legitimately interested states would deny recovery, but the plaintiff has filed suit in a *lex fori* state that permits it. In such a case, it might be possible to argue that since the forum state has little connection with the accident, the application of its law would deprive the defending airline of property without due process.

Counsel should be alert to use any of the section 6(2) factors, but three of them will be particularly helpful. Section 6(2)(c)'s principle of considering states' policies and interests concerning the *particular* issue at hand (depage) will apply in every case.²⁴ Reference to section 6(2)(f), which emphasizes the desirability of "certainty,

²² *Id.* § 6(1).

²³ See *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). These cases demonstrate that the United States Constitution limits the power of a state that has no significant relationship to an issue to characterize it as procedural in order to apply its own law. In *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), Justice Brennan stated that the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, Section 1 require that in order for a state to apply its own law, it "must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of law is neither arbitrary nor fundamentally unfair." *Id.* at 313. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985), the Court held unconstitutional the application of Kansas law in a class action where over ninety-nine percent of the oil leases involved, and ninety-seven percent of the plaintiffs, had no connection with Kansas.

If the defending airline has enough presence in the forum state to provide the basis for jurisdiction, it will have to be argued that, unlike the case in which the foreign plaintiff sues the airline in the state of its principal place of business or in some other state connected with the accident itself, this minimum contact does not itself vest the forum state with any legitimate interest in the problem at hand.

²⁴ *Air Crash Chicago*, 644 F.2d at 610-12.

predictability and uniformity of result,"²⁵ and section 6(2)(g), which recommends "ease in the determination and application of the law to be applied,"²⁶ will help support logical choice arguments for which specific precedent may be scarce. It should be remembered that section 6(2)'s "factors relevant to the choice of the applicable rule of law"²⁷ are not intended to be all-inclusive.

2. Section 145

Section 145(1) provides that the rights and liabilities of the parties to a tort issue "will be determined by the local law of the state which, with respect to that issue, *has the most significant relationship to the occurrence and the parties under the principles stated in § 6.*"²⁸ Section 145(2) lists four contacts that are "to be taken into account in applying the principles of section 6 to determine the law applicable to an issue" and that "are to be evaluated according to their relative importance *with respect to the particular issue.*"²⁹ Like the principles of section 6, these four contacts are not all-inclusive. Three of them—the place of injury, the place of conduct causing the injury, and the places connected to the parties' residence and business—are fully integrated into the discussion below. In air crash disasters, the fourth contact, the center of the parties' relationship, can probably be quickly dispatched. A note to Section 146, entitled "Personal Injuries," creates a presumption in favor of the law of the place of injury.³⁰ Unless the place

²⁵ RESTATEMENT, *supra* note 6, § 6(2)(f).

²⁶ *Id.* § 6(2)(g).

²⁷ *Id.* § 6(2).

²⁸ *Id.* § 145(1) (emphasis added).

²⁹ *Id.* § 145(2) (emphasis added). The four contacts are as follows:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

³⁰ See *id.* § 146. It states the following:

In an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties,

of injury is connected to the flight in some specific way other than as a merely fortuitous accident site, it should be fairly easy to overcome this presumption in air crash litigation.³¹

F. INAPPLICABILITY OF THE CENTER-OF-THE-PARTIES' RELATIONSHIP TO AIR CRASH DISASTERS

In *Air Crash Chicago* the intended flight plan was from Chicago to California. With respect to the Illinois decedents who purchased their tickets in Illinois, the court said that it was "unclear where the relationship of the parties is 'centered.'" ³² The court continued to say that "[s]urely the importance of the place of destination of a journey is just as great as the importance of the place of departure."³³

It must be recognized that the *Air Crash Chicago* court's discussion of the places of departure and destination as the center of the parties' relationship may itself harbor a fiction—what, for example, if a passenger at an American Airlines counter in Idaho had booked passage on the flight? In any case, the concept of the center of the parties' relationship is inapplicable to air crashes. In the *Air Crash Chicago* case, for example, it is difficult to imagine how any relation between American Airlines and any passenger could have been more clearly centered in Illinois than that between American and the Illinois decedents who resided in Illinois, purchased their tickets in Illinois,

unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Id.

³¹ In *Kaczmarek v. Allied Chem. Corp.*, 836 F.2d 1055 (7th Cir. 1987), the court noted that under the brand of interest analysis employed by Illinois courts, the presumption in favor of the place of the accident is easily overcome. *Id.* at 1057-58.

³² *Air Crash Chicago*, 644 F.2d 594, 612 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981).

³³ *Id.* The court then dismissed the issue because neither Illinois nor California allow punitive damages in wrongful death claims. *Id.*

began their flight in Illinois, and presumably would ultimately return to Illinois. Yet the court in *Air Crash Chicago* stated that it was unclear where the relationship of these Illinois parties was centered.³⁴ Furthermore, the concept of the center-of-relationship test demands more involvement on the part of the center state than any state connected with mass commercial transportation can have.³⁵ Finally, section 6(2)(f) and (g)'s interests in promoting certainty, predictability, and uniformity of result, as well as ease in the determination and application of the law to be applied, would be ill-served by an attempt to conjure-up a center of relationship in such a case.³⁶ Therefore, section 145's mandate to evaluate the center of relationship contact "according to [its] relative importance with respect to the particular issue"³⁷ requires that the center of relationship must be discounted as a factor in regard to tort claims generated by a commercial air crash.³⁸

In any particular choice problem, the following analysis will aid the evaluation of the significance of each of the remaining three contacts of section 145(2).

G. TWO BASIC INQUIRIES IN ALL CHOICE PROBLEMS

The development of a stance on all choice problems arising in forums using interest tests necessitates the solutions of two related problems. First, the governmental and private interests expressed in the different jurisdictions' laws on the particular subject at hand must be identified. Second, the rational evaluation and balancing of any actual conflicts between these laws must be evaluated and balanced.

³⁴ *Id.*

³⁵ *Id.* at 611-12.

³⁶ *Id.* at 612 n.17.

³⁷ RESTATEMENT, *supra* note 6, § 145(2).

³⁸ *Air Crash Chicago*, 644 F.2d at 612 n.18.

1. *Identification of Interests: The Search for the Parties' Legitimate Interests and the True Purposes of the Conflicting Jurisdictions' Rules*

The first inquiry necessitates the questions: 1) What is the plaintiff's or the defendant's legitimate interest in the matter? and 2) Does the jurisdiction's law fulfill that interest? Care must be taken, however, to separate those interests on the part of plaintiffs or defendants, which are merely by-products of laws actually designed to accomplish other goals. The model for this crucial analysis is the court's choice-of-law treatment of punitive damages in wrongful death actions in *Air Crash Chicago*. *Air Crash Chicago* established that even though plaintiffs certainly have an interest in acquiring punitive damages awards, this interest is merely a result of a state's real purposes in permitting punitive damages: punishment and deterrence.³⁹ Since, in order to qualify for punitive damages the plaintiffs must have already received compensation, their desire for punitive damages is not an interest that is relevant to the choice-of-law balancing process but is, instead, simply a gratuitous by-product of the state's desire to punish and deter. The imaginative extension of this rationale to other choice issues may reap considerable rewards. Put simply, the defendant's goal of identifying parties' legitimate interests and jurisdictions' true purposes is to isolate and discard those rules benefitting plaintiffs that are not legitimate or substantial for the purpose of choice-of-law balancing. *Air Crash Chicago* established that a jurisdiction's allowance of punitive damages is such a rule, but the court's reasoning may be extended to other matters.⁴⁰

For instance, consider those state rules refusing reduction to "present value" of an award for projected damages or denying the subtraction of projected income taxes and self-support costs from awards for lost earnings and loss of support to other family members. It may be diffi-

³⁹ *Id.* at 613.

⁴⁰ *Id.*

cult to identify a rational basis for favoring a plaintiff with an inflated recovery under such a rule. At the least, however, one can urge that if a plaintiff's interest in punitive damages is not one cognizable in the choice-of-law balancing, the allowance of such windfall additions to a plaintiff's full compensation should not be taken as equal in weight to rules that protect defendants from such inflated recoveries.

Some laws may perhaps elude tidy identification with one or the other of opposing interests. The mixed messages of such rules must be taken into account in the choice-of-law discussion.

2. *Rational Balancing Of Different Jurisdictions' Interests*

Choice-of-law rules other than simple *lex loci delicti* are bound to require some sort of balancing.⁴¹ Whether the forum's conflicts standard is the Restatement's "most significant contacts," or "governmental interest," or some variant of either of these, like California's "comparative impairment," it will be necessary to evaluate the relative importance of the interests of all the jurisdictions that are concerned with the particular problem. The prelude to this analysis is, of course, the identification of the actual interests noted above in subsection 1. Once again, it bears repeating that counsel must be careful to reveal and discard any results that are merely by-products of rules designed to serve other goals, for such by-products do not exhibit a purpose strong enough to warrant consideration in the choice-of-law balancing.

H. DOCTRINE OF DEPECAGE

At least in regard to the application of the Restatement's most significant contacts test, an identification of a jurisdiction's general interests in an air crash disaster does not end the analysis of interests, which is required for choice-of-law balancing. This is true because of the

⁴¹ *Air Crash Chicago*, 644 F.2d at 629-30.

doctrine of depeçage, which decrees that only those contacts pertinent to the specific issue under discussion are relevant to the determination of the law governing it.⁴² Under this doctrine, whether a state's interest is relevant to the particular choice-of-law balancing concerning a particular issue depends entirely upon the nature of the state's interest and the state's motivation, or lack thereof, to impose that policy under the circumstances at hand.⁴³

The *Air Crash Chicago* court's treatment of punitive damages in wrongful death cases provides a model for balancing different interests just as it did for evaluating the plaintiff's and each separate jurisdiction's legitimate interests.⁴⁴ In *Air Crash Chicago* the court stated that those plaintiffs' domiciles that do not allow punitive damages

do not have an interest in disallowing punitive damages because the decision to disallow such damages is obviously designed to protect the interest of resident defendants, not to effectuate the interest of the domiciliary states in the welfare of plaintiffs. . . . Nor do the [plaintiffs'] domiciliary states have an interest in imposing punitive damages on the defendants. *The legitimate interests of these states, after all, are limited to assuring that the plaintiffs are adequately compensated for their injuries and that the proceeds of any award are distributed to the appropriate beneficiaries.*⁴⁵

In sum, forums applying any kind of governmental interest test must begin with and be developed from an inquiry into the specific purpose of the governmental policy exhibited by each jurisdiction's particular rule.⁴⁶

⁴² See *id.* at 610-11; RESTATEMENT, *supra* note 6, §§ 6(c), 145(1) & (2). Depeçage derives from the French word *dépecer*, to cut up.

⁴³ *Air Crash Chicago*, 644 F.2d at 610-11.

⁴⁴ See *id.* at 594.

⁴⁵ *Id.* at 612-13 (emphasis added).

⁴⁶ See, e.g., the discussion of California's comparative impairment test. *Id.* at 621-28.

III. A FRAMEWORK FOR APPLYING AND EXTENDING THE REASONING OF *AIR CRASH CHICAGO* TO OTHER CHOICE PROBLEMS

A. THREE CATEGORIES OF GOVERNMENTAL INTEREST

In general, there are three categories of governmental interest in air crash litigation:

1. Laws designed to influence conduct and their opposing corollaries and laws protecting the defendant from the burdens of such conduct-influencing laws.⁴⁷

Examples: Punitive damages as a deterrent to careless behavior and the disallowance of punitive damages as a protection of businesses within the particular jurisdiction.

2. Laws designed simply to allocate loss and not to influence conduct. These laws are of three basic types:

- a) laws that put the risk of loss upon the defendant in spite of its due care,

Example: Strict Liability without any qualifications that take into consideration the defendant's conduct or other practical concerns. Since, by definition, such a rule benefits the plaintiff even though the defendant could not have done anything to protect against the injury,⁴⁸ it cannot be considered a conduct-altering rule.

- b) laws that, by defining who is entitled to compensa-

⁴⁷ As it will be demonstrated in Section III below, the true equality for choice-of-law purposes of rules having opposite results should not be taken for granted. Instead, because the equality or lack of it should be measured by a comparison of the significance of the policies underlying the opposing rules, it is important to identify those issues in which opposite rules may not deserve equal weight in the choice of law balancing. Examples of such imbalances will be discussed below.

⁴⁸ See, e.g., *Cunningham v. MacNeal Memorial Hosp.*, 266 N.E.2d 897, 902-03 (Ill. 1970). The court in *Cunningham* held that the defendant's inability to discover the hepatitis virus in the whole blood with which it transfused the plaintiff was not a bar to the defendant's strict liability. *Id.* The subsequent legislative overturning of *Cunningham*, of course, does not diminish the example of the case itself. See ILL. ANN. STAT. ch. 111§, para. 5102 (Smith-Hurd 1988). Many strict liability rules are not so purely in favor of the plaintiff in their loss-allocation. See discussion *infra* part III.B.2.a. Defense counsel must be careful to understand and use any qualifications of pure strict liability which favor the defendant.

tion, can increase or decrease a defendant's liability and, correspondingly, deny or extend relief to a class of injured parties,

Example: The allowance or disallowance of a parent's right to loss of the society of a surviving minor child.⁴⁹

c) laws that limit liability on some ground other than the relationship of the would-be plaintiff to the occurrence.

Example: Statutes of repose.

3. Laws establishing the elements of recovery after liability has been determined and the loss allocated.

Examples: Plaintiff's eligibility for prejudgment interest, the deduction of projected income taxes, and self-support from the defendant's liability in wrongful death cases.

The following is a general exploration of each category's interests, which are relevant to choice-of-law balancing. By providing theoretical examples of the advantageous extension of *Air Crash Chicago*'s reasoning to other choice of law problems, this exploration perhaps will provide a point of reference for the treatment of particular issues that may arise.

B. IDENTIFICATION OF THE INTERESTS IN EACH OF THE THREE CATEGORIES OF LAWS POTENTIALLY AT ISSUE AND ASPECTS OF THEM WHICH ARGUABLY FAVOR AN AIRLINE

1. *Laws Designed to Influence Conduct or to Protect Businesses from the Economic Burdens of Such Laws*

In *Air Crash Chicago* the Seventh Circuit stated that the legitimate interests of the plaintiffs' domiciliary states did not extend beyond ensuring their plaintiffs' compensation.⁵⁰ Therefore, the plaintiffs' states had no legitimate

⁴⁹ See, e.g., *Dralle v. Ruder*, 529 N.E.2d 209, 212 (Ill. 1988) (refusing to recognize a parental claim for loss of the society of a minor child who survived the injuries).

⁵⁰ *Air Crash Chicago*, 644 F.2d 594, 612-13.

interest either in benefitting their residents with punitive damage awards or in imposing punitive damages upon non-resident defendants.⁵¹ The contacts of a defendant that the *Air Crash Chicago* court deemed relevant to the choice-of-law balancing of a conduct-influencing law were the place of the defendant's misconduct and the principal place of its business.⁵²

Air Crash Chicago also noted that while states permitting punitive damages have an interest in deterrence of similar conduct, states that do not permit punitive damages have an interest in protecting defendants from "excessive financial liability."⁵³ While the policies of these two rules are expressed in different terms—conduct-influencing and business-encouragement, respectively—they must necessarily be considered equal in weight, because they embody opposite solutions to the same issue. Each rule must be deemed, under principles of comity, to embody equally important policies.⁵⁴

⁵¹ *Id.*

⁵² *Id.* at 620-21. If, in addition to the Restatement's consideration of the place of American's conduct causing the injury and its principal place of business, the doing of business in a plaintiff's domiciliary state also conferred an interest upon that state, the court might not have had to resort to the presumption in favor of the law of the place of injury. *Id.*

⁵³ *Id.* at 613.

⁵⁴ In California, for example, punitive damages appear to be forbidden in wrongful death claims, but permitted in survival actions. See, e.g., *In re Paris Air Crash*, 622 F.2d 1315, 1317 n.2 (9th Cir.), cert. denied, 449 U.S. 976 (1980) (finding that punitive damages were not permitted in wrongful death action); *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 353 (Cal. 1976) (stating that recovery of punitive damages was barred under wrongful death statutes); *Georgie Boy Mfg., Inc. v. Superior Court*, 171 Cal. Rptr. 382, 385 (Cal. Ct. App. 1981) (acknowledging that punitive damages were not permitted in wrongful death action). When both kinds of actions are based upon the same tortious death, it is impossible to reconcile the different rules by reference only to the state's interest in influencing or punishing behavior.

One can hardly interpret the difference as a reflection of different degrees of interest in preventing the same death. Thus, California's different rules concerning punitive damages in tortious death may be understood as expressing a judgment that recovery by the deceased's estate, standing in the victim's shoes, is warranted, but that the defendant should not be burdened with punitive damages claims by persons other than the deceased.

Air Crash Chicago demonstrated the equality of rules permitting and forbidding punitive damages when it ruled that Oklahoma's law permitting punitive damages

Not all opposing solutions to the same problem should command equal weight in choice-of-law balancing. In each choice-of-law problem, defense counsel must ascertain whether an interest in the particular subject, which is favorable to a defendant, is more securely based in rational policy than is the rule resulting in the opposite result.⁵⁵

2. *Laws Designed Not to Influence Conduct But Only to Allocate Loss*

A defending airline may become involved with two kinds of issues that invoke laws whose substance excludes any connection to the defendant's conduct and whose entire purpose is simply to allocate a loss that has undeniably occurred. As the hypothetical examples below will illustrate, the potential ramifications of such single purposefulness may be helpful.

a. Strict Liability

Strict liability, liability based solely on the nature of the product, can be viewed as expressing the single concern of shifting the economic burden of the injury from the privity-deprived plaintiff to the manufacturer who has induced the sale and profited from it.⁵⁶ In its purest state, such liability is entirely divorced from considerations of the manufacturer's conduct.⁵⁷

and New York's law disallowing them were equally balanced: "[W]e conclude that the place of conduct and the principal place of business each have strong interests in having its law applied to the punitive damages question; we are unable to say that one state's interest is greater than the other." *Air Crash Chicago*, 644 F.2d at 620-21.

⁵⁵ See *infra* part III.B.3.c. (discussing rules concerning the reduction of compensation for future loss to present value).

⁵⁶ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 98 (5th ed. 1984).

⁵⁷ Negligence considerations frequently dilute strict liability's concentration upon pure loss-allocation. In Illinois, for example, a manufacturer may not be held strictly liable for a design defect if a safer design is not feasible. *Kerns v. Engelke*, 390 N.E.2d 859, 864 (Ill. 1979). Furthermore, a manufacturer may not be held strictly liable in failure-to-warn cases unless it knew of the danger. *Woodill v. Parke Davis & Co.*, 402 N.E.2d 194, 198 (Ill. 1980).

b. Limitations on Those Who May Recover

The defendant's liability is similarly divorced from conduct when the inclusion or exclusion from possible recovery of a class of injured persons depends only upon considerations of the nature of the class's injuries and of how directly their causation flows from the actual tort. For example, while few people would doubt that the non-fatal injury of a minor child inflicts a terrible loss upon parents, the Illinois Supreme Court has recently denied parents a right to compensation for this loss.⁵⁸ Wishing to check an ever-widening scope of loss-of-society claims, the court based its rejection upon 1) the difficulty of "distinguish[ing] between the child's claim, involving pain and suffering, and the legally distinct but factually similar claim by the parents for loss of the child's society and companionship"⁵⁹ and 2) the difficulty, if not impossibility, of quantifying the parents' loss in a satisfactory manner.⁶⁰

c. Statutes of Repose

Statutes of repose plainly are not concerned with defendants' conduct since such statutes do not change either the standards by which defendants' conduct would be measured for injuries occurring before the expiration of the statutes' time or the degree of their potential liability. Statutes of repose simply embody a legislative decision that after a certain period of time, the risk of loss should no longer fall upon the party originally responsible for the product.

The choice-of-law ramifications for each of these subcategories could become very important to a defending airline. Using the special characteristics of each problem as a foundation, the following hypotheticals illustrate searches for the true nature and relative gravity of oppos-

⁵⁸ *Dralle v. Ruder*, 529 N.E.2d 209, 213 (Ill. 1988).

⁵⁹ *Id.*

⁶⁰ *Id.*

ing rules, which superficially may appear to be in irreconcilable conflict.

d. Hypothetical Problems: Allocation of Loss Laws

Hypo 1: Defendant's state⁶¹ imposes a strict liability standard in design-defect cases which is more favorable to plaintiffs than the strict liability rule of the plaintiff's own state: an example of how to neutralize an apparently damaging rule.

Let us assume that Colorado citizens allege a strict liability count against an airline based upon the airline's involvement in the design of the accident aircraft. Let us assume also that the aircraft's manufacture in California could very likely implicate California's law on the basis that the airline's involvement in the design phase occurred at least in part in California. Furthermore, let us assume that under California law the plaintiff's burden of proof concerning strict liability in design is easier than it would be concerning negligence in design⁶² and easier than that required in the plaintiff's own state of residence. If this were the case, application of California's rule would appear to be potentially damaging to the airline. In reality, however, *Air Crash Chicago's* reasoning could be extended to make a very strong case for dismissing such a rule entirely from the choice-balancing concerning the plaintiff's strict liability proof.

It could be argued that, absent a California plaintiff,

⁶¹ Although *Air Crash Chicago* demonstrates that a defendant corporation has at least two connections which must be considered in "most significant interest" balancing: 1) its principal place of business and 2) the place of its conduct, in this hypo, as well as hypotes 2 and 4, the process of weighing interests is more simply illustrated by the use of only one interest for each party.

⁶² When the design defectiveness of a product cannot be adequately measured by consumer expectations, California provides an alternate measurement, which enables the jury to consider, among other things, the gravity of the danger posed by the design, the likelihood that such danger could occur, and the actual feasibility of a safer alternative design. See *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 455 (Cal. 1978). While this standard is explained as a retention of strict liability's focus on the product rather than a return to negligence principles, it is difficult to deny that this standard reinstates negligence considerations.

California has no interest in imposing strict liability for defective design. The negative impact of such a rule upon the defendant is not the result of a primary purpose like the conduct-influencing goals expressed in normal negligence rules or punitive damages. Rather, it is simply an unavoidable result of pure strict liability's principal goal of favoring injured plaintiffs. Since this rule is not designed to control or influence resident defendants, it can only be interpreted as expressing the policy of protecting resident plaintiffs. Supporting this argument is the fact that California has no real interest in burdening corporations doing substantial business in California with losses suffered by non-California plaintiffs.⁶³ If this is so, California's strict liability law should not be relevant to the choice-of-law balancing in a case concerning a Colorado plaintiff.

Hypo 2: Defendant's state permits recovery by a particular class of plaintiffs.

If, like Illinois, the state of a defending airline's principal place of business forbids a parent's right of action for the loss of society of a nonfatally injured minor child, that state's interest in limiting the liability of defendants centering their business within its borders must, of course, be considered a strong factor in the choice-of-law balancing concerning the existence of this right of action. Following *Air Crash Chicago's* reasoning, if the parent's state permits this right of action, the two opposing rules may cancel each other and yield choice-of-law dominance to the law of the place of injury.⁶⁴

If, however, the state of the airline's principal place of

⁶³ The *Air Crash Chicago* court put it this way:

California, place of MDC's conduct in manufacture and design of the DC-10, also has a strong interest in the issue of punitive damages. California . . . has a substantial interest in the economic health of corporations which do business within its borders. It derives substantial sales and income taxes, as well as other revenues, directly and indirectly from a corporation's activities within the state.

Air Crash Chicago, 644 F.2d 594, 614 (7th Cir.), cert. denied, 454 U.S. 878 (1991).

⁶⁴ See *id.* at 614-15.

business or the state where the conduct occurred does permit the parent's right of action, and if the parent in question is a citizen of a different state which does not permit the parent's action, it can be argued that the adverse rule of the airline's state or states is not to be considered in the choice-of-law balancing. The reason is the same as that in Hypo 1.

We have established that the rule permitting this right of action has no purpose of affecting defendants in any way other than as an indirect, by-product result of the rule's actual goal of allocating the loss in favor of the plaintiff. It follows that the parents to be favored by this rule are resident parents and not non-resident parents whose recovery under the rule would burden businesses which the airline's state has a large interest in protecting. Therefore, even though the rule of a state associated with the defendant may seem to favor the plaintiff, a court might be persuaded to eliminate any such defendant-state's rule from the choice-of-law resolution and apply the rule of the plaintiff-parent's state.

Hypo 3: The states of both the defendant's principal place of business and of its misconduct have a strict liability statute of repose, but the plaintiff's state of residence has no such statute.

Here we have a direct conflict. The defendant's states have determined that after a certain amount of time, strict liability's imposition of loss upon a manufacturer is no longer justified.⁶⁵ Such a cut-off expresses the desire to spare a manufacturer the responsibility for all the products it ever produced and to shift some of that responsibility to those who have more recently benefitted from the continued use of the particular product. The plaintiff's state, on the other hand, has determined that its strict liability loss-allocation is not to be qualified by any passage

⁶⁵ Illinois, for example, has such a rule. ILL. ANN. STAT. ch. 110, para. 13-213(b) (Smith-Hurd 1984).

of time other than that of the applicable statute of limitations.

If numbers were decisive in such situations, the interest of the defendant's two states in limiting the time for strict liability's loss allocation would of course prevail, and the only remaining problem would be that of choosing which state's statute of repose should govern. The *Air Crash Chicago* case, however, demonstrates that choice-of-law puzzles are not "numbers games."⁶⁶ So, let us assume that in terms of their immediate result, the rules of the defendant's states exactly balance the rule of the plaintiff's state. If the purely superficial result-based test were accepted as the whole story, then, under the Restatement's and Illinois' rule, the court might defer to the presumption favoring the law of the state of the accident. If that state has not imposed a statute of repose upon its strict liability law, such a deferral would be adverse to the airline. Accordingly, the airline would wish to argue that a purely result-based test is not sufficient and that the interests implemented by statutes of repose merit greater consideration than the interest in imposing upon manufacturers an open-ended risk of strict liability exposure.

But even if the accident-state has adopted a statute of repose concerning strict liability, it would be better for two reasons if one could develop some reasonable justification for asserting that a defendant's states' statutes of repose deserve greater weight than the plaintiff's state's unqualified imposition of strict liability. First, doing so would provide airlines with a stronger argument than the mere reliance on a presumption in favor of *lex loci delicti*. Second, the rationale supporting the unequal balancing in hypo 3 might help counsel to make at least a credible argument that a similarly unequal balance should exist in favor of strict liability statutes of repose even if one of the defendant's states also has not qualified its strict liability provisions with such a statute.

⁶⁶ See *Air Crash Chicago*, 644 F.2d at 613.

The key to fashioning a solution is to stress the fact that strict liability's imposition of responsibility in the absence of the defendant's fault constitutes a radical departure from the normal tort requirement of the breach of some duty of care.⁶⁷ The policy of imposing losses upon defendants in spite of their exercise of due care indeed does serve the legitimate purpose of imposing losses on the manufacturer who is able to distribute the cost of injuries among all the purchasers of the product.

Perhaps, however, there comes a time when continuing a manufacturer's strict liability exposure for products long ago distributed puts an unreasonable cumulative burden both on the manufacturer and the present purchasers of its products to whom the additional expense ultimately will be passed. If, in general, plaintiffs had no possible means of recovery other than strict liability, the interest expressed by a plaintiff's state's refusal to impose a statute of repose upon strict liability would probably have to be given weight equal to that of statutes of repose. In such a case, this equality would be the only way to honor the plaintiff's state's obvious interest in ensuring that its residents have some cause of action for their injuries. Frequently, however, plaintiffs sue both in negligence and strict liability. In this case, it can be argued that the advantage the plaintiff gains in not having to prove a breach of duty by the manufacturer is not equally important to the manufacturer's state's interest in protecting its resident manufacturers against perpetual, and therefore endlessly cumulative, exposure for injuries caused by no fault of the manufacturer.

⁶⁷ Contaminated food was the product that first provoked what amounted to a cause of action in tort not based upon the breach of some duty of care. The road from this exception to modern strict liability law was slow and difficult. See EDWARD H. LEVI, *INTRODUCTION TO LEGAL REASONING* (1962).

3. *Laws That Do Not Influence Conduct or Allocate Risk But Only Establish the Nature and Method of Recovery After Liability Has Been Determined*

a. Introduction

There are a number of potential issues in air crash cases that do not invoke a given state's interest in influencing conduct, but instead define compensation and how it is going to be paid by the defendant. Three layers of considerations may be discerned in regard to compensatory damages. The first concerns the overall view of damages and their constitution. This category concerns such issues as state-imposed caps on certain classifications of damages⁶⁸ or prohibitions of particular elements of compensatory damages.⁶⁹ The section in this Article entitled "Compensatory Damages"⁷⁰ argues that regardless of the effect on the defending airline, the law of each injured or deceased passenger's domicile must control this aspect of damages.

The second consideration is the proper measurement of the damages permitted under the category above. For example, in wrongful death cases, the question may be whether or not the deceased's projected wages must be reduced by the estimated amount he would have spent in self-support and taxes.⁷¹

The final consideration involves computational issues which, taking into account prevalent economic realities, determine how—or whether—the plaintiff receives the sum that most accurately represents a complete yet not excessive award. Examples of this category of concern are

⁶⁸ For example, Colorado caps wrongful death damages for noneconomic loss or injury at \$250,000. COLO. REV. STAT. § 13-21-203 (West 1990).

⁶⁹ For example, damages under Illinois' wrongful death statute are limited to pecuniary injuries resulting from the victim's death, ILL. REV. STAT. ch. 70, para. 2 (1989), and do not include the victim's pain and suffering. *See Drews v. Gobel Freight Lines*, 578 N.E.2d 970, 973-74 (Ill. 1991).

⁷⁰ *See infra* part V.

⁷¹ *See, e.g., In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979*, 701 F.2d 1189, 1192-93 (7th Cir. 1983); *In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979*, 803 F.2d 304, 312 (7th Cir. 1986).

rules requiring or forbidding the reduction of lost future earnings to present value, and rules regarding the proper calculation of prejudgment interest.

Although the choice-of-law concerning any of these three layers of compensatory damage considerations frequently has significant economic consequences,⁷² these categories of consideration do not necessarily require uniform analysis for purposes of choice-of-law. For example, although it is argued below⁷³ that a defending airline should accept the various plaintiffs' domiciliary states' control of the basic award of damages whether or not they are capped or limited in some way, there is no reason for the airline to accept passively the redundant or inflated burdens imposed by such rules as the refusal to reduce future wages to present value or the refusal to permit the reduction of future wages by estimations of the deceased's future tax liability and self-support. Such rules, and their more sensible opposites, are but alternate methods of carrying forward the jury's finding concerning the decedent's projected gross earnings over a normal lifetime to the fulfillment of the applicable wrongful death act's purpose.

b. An "*Erie* Conundrum" — Substance v. Procedure

In *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*⁷⁴ the Seventh Circuit ultimately escaped the necessity of categorizing as substantive or procedural Illinois' rule concerning the admission of evidence about the future tax liability the deceased would have had to pay on the wages his death prevented him from realizing.⁷⁵ With evident relief, the court stated:

Fortunately, we need not resolve this *Erie* conundrum in this case, because we hold that Illinois' substantive mea-

⁷² For example, the difference between the liability for lost future earnings which are not discounted to present value and such liability which is discounted obviously can be very great.

⁷³ See *infra* part IV.B.4.

⁷⁴ 701 F.2d 1189 (7th Cir. 1983).

⁷⁵ *Id.* at 1195.

sure of damages is identical to the FELA measure [permitting evidence of future tax liability under the rule of *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490 (1980)], leaving the district court free to admit all evidence relevant to that measure under Fed. R. Evid. 402.⁷⁶

This finding saved the court from having to decide whether Illinois's—and, indeed, the majority's—rule excluding evidence of future taxes is “procedural and therefore not binding on the federal courts under *Erie*” or whether Illinois’s “evidentiary rule” “defines what is sought to be proved—here, the measure of damages—[so that] it may bind the federal court under *Erie* principles.”⁷⁷ In support of the procedural nature of the question, the court stated:

In adopting the rule that rejects evidence as being too confusing, a state court may merely be making a statement about its own competence and that of its juries to deal with this kind of evidence. But a federal court may assess its own capabilities differently, and logically should not be bound by the state court’s self-evaluation. Indeed, to the extent that the exclusionary rule is based on fear of confusion, it should not apply in federal court because Fed. R. Evid. 403 provides a federal standard for rejecting relevant evidence on the grounds of risk of prejudice, confusion, or waste of time, and . . . the Federal Rules generally displace differing state rules even when the state rule is “outcome-determinative.”⁷⁸

In support of the substantive nature of the question, the court set forth the following two considerations that “may be so closely linked with the state’s view of the measure of damages (which is inseparable from the substantive right of action,⁷⁹ that it binds a federal court sitting in diversity.”⁸⁰

⁷⁶ *Id.*

⁷⁷ *Id.* at 1193.

⁷⁸ *Id.* at 1195.

⁷⁹ *Id.* at 1194 (citing *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 491 (1916)) (citations omitted).

⁸⁰ *Id.*

- 1) [T]he calculation of net income is too speculative or confusing because of tax rate fluctuations and the difficulty of predicting exclusions and exemptions to which the decedent would have been entitled[.]
- 2) [I]naccuracies resulting from the projection of gross rather than net income are offset by the undercompensating effects of ignoring inflation of attorney's fees[.]⁸¹

The fact that the difficulties of prediction and danger of confusion appear as support for dubbing a rule excluding projected tax liability both substantive and procedural only serves to illustrate the confusion inherent in this particular incarnation of the substance/procedure puzzle. Although it may be attractive for defense attorneys to call State A's rule excluding evidence of prospective tax liability "procedural" in order to attempt its admission under Federal Rules of Evidence 402 and 403,⁸² defense attorneys may well ask whether the opposite rule is also procedural. That is, is State B's requirement that tax liability be considered merely a procedural recognition that its courts and juries can deal with the speculative intricacies of prediction? If it is, consistency with the airline's position in regard to State A's rule would require that the airline pursue not State B's definitive rule but Rule 403's more uncertain balancing between probative value and the danger of unfair prejudice. Thus, although attorneys must be on the lookout for helpful applications of the substance/procedure dichotomy in regard to issues arising from the second and third categories of considerations regarding compensatory damages, they must also be aware of the potential ramifications of such arguments as they may be applied later in the litigation to similar issues raised by different plaintiffs who invoke different state's rules. The following examples of damage-computation issues will perhaps help attorneys develop techniques for making the most of choice-of-law problems concerning such issues.

⁸¹ *Id.* at 1193-94.

⁸² *See id.* at 1195.

c. Hypothetical Problems: Reduction to Present Value

Hypo 4: Plaintiff's state requires reduction to present value but defendant's state does not.

Hypo 4, a simplification of the situation which assumes the second-to-the-worst line-up of interests in respect to the defending airlines, will illustrate the kind of reasoning which can be helpful.⁸³

The rule requiring the reduction to present value of awards for projected future damages is plainly motivated by a desire to protect defendants from inflated liability. Concerning plaintiffs, however, this rule is neutral in that its goal is simply to make the injured person or her representative economically whole. By the accrual of interest earned on the discounted award the plaintiff can attain the same economic benefit the injured person would have accrued over the projected future time had the injuries not occurred—but no more.⁸⁴ It is not quite as easy to identify a logical rationale for a rule refusing deductions to present value. While such a rule undoubtedly burdens the defendant, it does so for no readily ascertainable primary purpose—it exists neither to influence conduct nor to allocate primary liability.⁸⁵

This analysis should be very useful in treating Hypo 4.

⁸³ The worst line-up of interests would be that all the defending airline's states as well as the plaintiff's state forbid reduction to present value. In such a case, the airline will indeed have a problem!

⁸⁴ *In re Air Crash Disaster Near Chicago, Ill.*, on May 25, 1979, 644 F.2d 633, 643-46 (7th Cir. 1981), contains an instructive illustration of the principle in its discussion of the difference between a reduction to cash value at the time of death and at the time of trial.

⁸⁵ In *In re Air Crash Disaster Near Chicago, Ill.*, on May 25, 1979, 701 F.2d 1189 (7th Cir. 1983), the court listed the following among states' rationales for the majority rule (at least at the time), which excluded evidence of a decedent's would-be tax liability for the purpose of proving the amount of damages:

Unacceptable speculation and confusion in the calculation of net income caused by tax rate fluctuations and difficulty of predicting exemptions to which decedent would have been entitled;

Inaccuracies resulting from the projection of gross rather than net income as an offset to the undercompensating effects of ignoring inflation and the plaintiff's payment of attorney's fees.

701 F.2d at 1193-94.

Whatever may be the rationale for its rule, the defendant's state has no interest in burdening its resident defendant to the windfall advantage of a non-resident plaintiff. For its part, the plaintiff's state perhaps has no real interest in extending the benefit of its present-value rule to a non-resident defendant. Thus, we are presented with an apparent draw between two disinterested states.

Under the Restatement's rule,⁸⁶ a true draw between interests of states other than the place of the accident will result in the application of accident state's law.⁸⁷ It should be argued, however, that in reality there is no draw. The reason is that the plain logic and fairness of the plaintiff's state's present-value rule deserves greater weight than the illogical and unfair rule of the defendant's state.⁸⁸ Plaintiff's state's rule should therefore be applied, particularly since the place of the accident has absolutely no connection to the elements of recovery acquired by a non-resident plaintiff against a non-resident defendant. Because this result makes basic sense, it satisfies the Restatement's mandate that among the factors to be considered in the choice of law are "certainty, predictability and uniformity of result, and . . . ease in the determination and application of the law to be applied."⁸⁹

⁸⁶ RESTATEMENT (SECOND) OF TORTS § 914A (1977).

⁸⁷ *Id.*

⁸⁸ In regard to wrongful death suits, comment c to the Restatement (Second) of Torts § 914A, entitled "Effect of Taxation," states:

In the majority of states, the recovery of the statutory beneficiaries is measured by the contributions that the deceased would have made to them if he had lived. . . . This amount obviously could not be equivalent to his gross earnings, as he could not have given them funds that he spent on himself or paid in taxes or used for other purposes; and an appropriate percentage of his expected earnings, taking into consideration these various types of expenditures, is proper.

Id. cmt. c.; see *In re Air Crash Disaster Near Chicago, Ill.*, on May 25, 1979, 803 F.2d 304, 311 (7th Cir. 1986).

⁸⁹ RESTATEMENT, *supra* note 6, § 6(f)-(g); see *Air Crash Chicago*, 644 F.2d at 616 (emphasizing these Restatement factors).

Hypo 5: Plaintiff's state and the state of defendant's principal place of business require reduction to present value, but the state of defendant's misconduct does not.

Since in the case of defendant-corporations, the Restatement's test, at least, requires consideration of the interests of the principal place of the corporation's business as well as the place of its misconduct, the reasoning of Hypo 4 would have to be extended to include a discussion of the interests of both these states. If the states of the airline's principal place of business as well as of its misconduct both employ present value, of course there would be no conflict between the plaintiff's state and the airline's states. If, however, the place of the airline's misconduct refused the present-value reduction, it should be argued that 1) the misconduct-state's interest is not one having to do with conduct and 2) the misconduct-state is not interested in burdening a defendant within its borders with a windfall to a non-resident plaintiff. Accordingly, on the issue of reduction to present value, the interest to be considered in relation to the defendant is that of its principal place of business which has expressed a rule favoring all businesses within its borders above all injured parties.

Hypo 6: Plaintiff's state and the state of defendant's misconduct do not permit present-value reduction but the state of defendant's principal place of business requires it.

The difference between this hypo and the one above is that whatever may be its rationale, the rule of the plaintiff's state favors its plaintiffs with the windfall recovery inherent in the denial of the discounting to present value. Such a case presents a more difficult argument for defense counsel. The foundation for the airline's position must be a demonstration of the lack of interest of the misconduct state under the present circumstances. The defending airline's argument should be that a state can have no legitimate interest in penalizing a defendant by imposing on it the burden of giving a windfall to the plaintiff. Therefore, the only interest discernable in such a state's rule is one

that favors plaintiffs. But this interest, it can be argued, does not go so far as to burden a defendant, whose business the state wishes to encourage within its borders, with a windfall to non-resident plaintiffs with whom the state has no connection at all.⁹⁰ This reasoning eliminates the state of the defendant's misconduct and leaves remaining the same two opposing but unevenly weighted rules discussed in Hypo 4 above.

The kind of analysis sketched here can be applied to different line-ups of rules requiring or forbidding reduction to present value. Similar approaches can be taken to the problem of allowance/disallowance of a decedent's projected income taxes and projected costs of normal self-support.⁹¹

d. Three Categories of Hypotheticals Concerning Prejudgment Interest

In air crash litigation, an airline may be confronted with choice problems concerned with three categories of prejudgment interest issues:

1. The assertion of some states' laws permitting prejudgment interest on personal injury and wrongful death awards;
2. The assertion of prejudgment interest on any property damages awarded;
3. The assertion of prejudgment interest on the recovery of contribution toward the past payment of personal injury and wrongful death awards.⁹²

e. Two Prerequisites for the Logical Assessment of Prejudgment Interest

The frame of reference for dealing with any prejudgment-interest choice of law problem consists of the identi-

⁹⁰ *Air Crash Chicago*, 644 F.2d at 614.

⁹¹ See *supra* text accompanying note 81.

⁹² For a review of particular states' rules concerning prejudgment interest, see James D. Wilson, et al., *Prejudgment Interest in Personal Injury, Wrongful Death and Other Actions*, 1986 TRIAL LAW GUIDE 105 (1986).

fication of the economic components of complete recovery under the particular circumstances. In purely logical terms, the assessment of prejudgment interest requires the establishment of two prerequisites.

1. *The passage of time must be a separate component of the damages necessary to compensate the plaintiff fully.*

The first condition to a logical prejudgment interest rule is the demonstration of the necessity of including the passage of time as a separately calculated component factor that is indispensable to the complete compensation for the loss. When one is deprived of some object of value (*e.g.*, an airplane, house) or some medium of exchange symbolizing an interest in objects of value or the power to acquire them (*e.g.*, stock certificates, bonds, money), she suffers not only the primary, basic loss of the item itself — its replacement value as measured at the time of loss — but also the loss of the income or accumulation of value accruing from the use, investment, or even mere preservation of the item. This kind of time-incurred loss that is added to an identifiable and separate primary loss is completely different from time-based losses which, like permanent disablement, form an inseparable element of the primary loss itself.

2. *The time period defining the loss properly addressed by prejudgment interest must be limited to that between the occurrence of the loss and the judgment.*

The second condition is that the economic loss which prejudgment interest recompenses properly can be only that suffered by the plaintiff or her representative for the period between the loss and the judgement. More than just the name, prejudgment interest, compels this conclusion. The other two periods during which a plaintiff can accrue interest are otherwise accounted for: post-judgment interest takes care of the time between judgment and satisfaction; and after the payment of the judgment, the plaintiff himself becomes responsible for the accrual

of interest.⁹³ This principle may be generally stated as: No prejudgment interest should be allowed to accrue on any part of the loss which is not attributable to the time period between the occurrence generating the aggregate loss and the judgment.

f. Two Threshold Questions About Damages Necessary to a Prejudgment Interest Analysis

Many states violate the fundamental logic of these two conditions in a variety of ways. But regardless of the particular rules involved in any given prejudgment-interest choice problem, the defending airline's solution should begin with two questions:

1. Does the damage-computation necessitated by the particular cause of action at issue (for example, lost wages in wrongful death or loss of society) include—either implicitly or explicitly—the passage of time? Perhaps it will help to frame the question as: At the time of the occurrence, was the loss at issue one which is to be measured by reference only to the moment immediately after the occurrence and without any measurement of loss accruing either between the occurrence and the judgment or of the future beyond the judgment?⁹⁴ If the answer to this question is “Yes,” it will sometimes be difficult to make a rational argument against the necessity of prejudgment interest for the plaintiff's total compensation.
2. If, however, the damages do include some passage of time, the attorney must identify the period or periods of time included. For example, recovery of lost future wages in a wrongful death case actually

⁹³ It is the plaintiff's ability to make this interest which prompts some jurisdictions to require a reduction of a decedent's projected lost future earning's to present value.

⁹⁴ For example, if an auto is demolished in a collision, the damage to the property itself which the owner suffers is measured solely by comparing the car's value before and after the accident.

includes calculations of both the wages lost between the accident and the judgment, and the post-judgment wages which the fact finder estimates from projections of the decedent's life expectancy and career opportunities.

While logic dictates that prejudgment interest should accrue on those wages the decedent would have earned before the judgment,⁹⁵ it should not accrue on those projected after the judgment. The reason is that during the period between the accident and the judgment, the decedent himself could not have accrued any interest on the wages he would have earned after that time. Plainly, granting such a windfall to the decedent's heirs imposes a burden upon the defendant which exceeds full compensation.⁹⁶

The following sets of hypotheticals will illustrate approaches to each category of prejudgment interest problem. Although the rule of a state like Illinois, which does not allow prejudgment interest, may be favorable to defendants in some respects, it must be recognized that under the kind of interest-analysis prescribed above, the disallowance of prejudgment interest can be illogical and unfair in regard to a defendant in at least two respects: 1) in cases of property losses the defendant suffered at the time of the accident, and 2) in cases of claim payments the defendant may have made before acquiring the right of contribution from another defendant.

⁹⁵ Ideally, of course, this prejudgment interest should accrue only incrementally at the rate the decedent would have realized the wages. See *Moore-McCormack Lines v. Richardson*, 295 F.2d 583, 595 (2d Cir. 1961), cert. denied, 368 U.S. 989 (1962). Moreover, the prejudgment interest should not be figured on gross wages but upon the amount the decedent herself would have had at her disposal after the deduction of taxes and her own support.

⁹⁶ For elaboration of this point, see *In re Pago Pago Aircrash* of Jan. 30, 1974, 525 F. Supp. 1007, 1016 (C.D. Cal. 1981), in which the court noted that prejudgment interest on the present-value award compensating for the lost wages *accruing after the trial* is not necessary to put the plaintiff in the position he would have been had he been made whole at the time of his injury.

g. Category 1: Prejudgment Interest on Personal Injury and Death Awards

In wrongful death and survival actions as well as personal injury actions, it will be important for defending airlines to avoid the application of rules which permit interest on compensatory damages to run from the date of death or injury.⁹⁷ The ensuing discussion shows the inherent redundancies possible in prejudgment interest assessments in such cases. The sensible solution is to prohibit these redundancies and permit prejudgment interest only when the compensatory damages awarded do not themselves compensate for the loss of the financial rewards that the passage of time/accrual of value would have bestowed upon the injured party had the injury not occurred.

Hypo 7: One of the airline defendant's states allows no prejudgment interest in personal injury or wrongful death cases,⁹⁸ but the other gives the jury the discretion to assess it both for wrongful death and personal injury;⁹⁹

⁹⁷ Iowa, for example, permits such interest in wrongful death, but appears to deny prejudgment interest in personal injury cases. In *Wetz v. Thorpe*, 215 N.W.2d 350, 357-58 (Iowa 1974), the court acknowledged the general rule that unliquidated damages do not support interest until judgment. *Id.* at 357. The court noted the exceptions to this rule when the damages are complete at a given time, and stated, "[c]ertainly the injury and resulting damage in this case were complete and the obligation of the defendants to pay was perfect at the instant of death and an allowance of interest from the date of death is essential to the accomplishment of full justice." *Id.* at 358.

⁹⁸ In Illinois, "the general rule is that prejudgment interest cannot be awarded unless provided by statute or agreement of the parties." *Air Crash Near Chicago, Ill.*, 644 F.2d 633, 638 (7th Cir.), *cert denied*, 454 U.S. 878 (1981). In addition, prejudgment interest is not available in wrongful death or personal injury cases. *Robles v. Chicago Transit Auth.*, 601 N.E.2d 869, 882-83 (Ill. App. Ct. 1992); *Northern Trust Co. v. County of Cook*, 481 N.E.2d 957, 962 (Ill. App. Ct. 1985).

⁹⁹ California, for example, permits prejudgment interest as follows:

(a) Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor. . . .

(b) Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim

plaintiff's state permits prejudgment interest for personal injury and wrongful death awards.

Here, there are two steps to the balancing test. The first is between the two states associated with the defendant and the second between the dominant defendant-associated interest and the plaintiff's state's interest.

Step 1

The attorney must first deal with the conflict between the defendant's states. One of the defendant's states expresses a flat interest in protecting defendants against prejudgment interest. Imagine, however, that the defendant's other state grants the jury the discretion to levy prejudgment interest without making any exception for instances in which the basic award's inclusion of the passage of time as an element of damages makes the addition of prejudgment interest redundant. Defense counsel must develop an argument showing why the former state's rule is entitled to greater weight than the latter state's rule.

The groundwork for this argument lies in the identification of those rules that inflict upon the defendant an unfavorable redundancy of recovery to the plaintiff. But beware! The assertion of a redundancy of recovery which prejudgment interest would impose must not violate previously established the basic principles. The credibility and persuasiveness of the defending airline's arguments will depend upon a precise identification of the nature of any redundancies of recovery which the granting of pre-

was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may in its discretion, fix, but in no event earlier than the date the action was filed.

CAL. CIV. CODE § 3287 (West 1970).

In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury.

CAL. CIV. CODE § 3288 (West 1970).

It appears that Section 3288 gives the jury the discretion to assess prejudgment interest on personal injury awards. *Id.*

judgment interest would impose on the defendant. Two examples will illustrate this point.

EXAMPLE (A): An award for the decedent's pain and suffering constitutes a monetary measurement of the nature and duration of the decedent's suffering. In a sense, such a measurement may look similar to the measurement of property loss which logically supports prejudgment interest. Unlike the gradual projected accrual that defines the aggregate loss of future wages, no future projections of loss are possible in such a case. Instead, the entire loss has accrued upon the decedent's death before the judgment. These realities might seem to suggest prejudgment interest.

One can argue, however, that there is an essential difference between the measurement of damages for pain and suffering, and those for property damage. Property damages are measured by reference to values at the time of the loss. Damages for pain and suffering have no such point of reference, but rather, are measured according to the fact-finder's present perceptions of the deceased person's pain and suffering which may have occurred several years earlier and perhaps in a climate of lesser jury awards.¹⁰⁰ The obvious unavailability of any objective measurement of the damages themselves injects an element of instability into the issue which airline defendants can perhaps argue to their advantage.

Counsel can assert that, even if the plaintiff's state may have a right to impose prejudgment interest for pain and suffering upon a defendant which has strong ties to the state, the weighing changes when the defendant's ties are not so strong. In such a case, a plaintiff's state's rule permitting prejudgment interest to be superimposed upon an already purely subjective compensatory award does not deserve equal consideration with the defendant's state's rule protecting resident defendants from prejudgment interest, which under the circumstances, inflicts a high chance of redundancy in recovery.

¹⁰⁰ Perhaps in a given jurisdiction it might be possible to develop statistics showing increases in particular categories of jury awards; if so, it might be argued that a jury's evaluation of pain and suffering already includes compensation for the passage of time.

EXAMPLE (B): A reward for a decedent's lost earnings plainly includes compensation the decedent would have earned after the date of the judgment. Permitting prejudgment interest on that part of the lost earning award that projects the wages plaintiff would have earned after the judgment plainly imposes a surcharge on the compensation which the fact-finder has determined to be due from the defendant. The argument here is the same as that in Example (A) above: defendant's state has a more legitimate interest in protecting its resident businesses from such unfair burdens than does the plaintiff's state in giving a windfall to the plaintiff.¹⁰¹ After the identification of the exact nature of the redundant recovery resulting from an assessment of prejudgment interest, counsel may proceed to argue that one airline-related state's protection of defendants from hidden redundancies in recovery should outweigh the discretionary allowance of such redundancies which another state related to the airline permits.

It must be argued that although a jury's discretionary assessment of prejudgment interest is perfectly consistent with the basic compensatory principles in a property damage case in which the amount of compensatory damages is hotly contested, a similar assessment in Examples (A) and (B) above would certainly violate these principles. Indeed, in Examples (A) and (B) it is possible to discern only one real policy motive which the discretionary-interest state could have for permitting the assessment of prejudgment interest: the desire to benefit plaintiffs. As previously demonstrated, when the plaintiff is not a resident of a discretionary-interest state, a cogent argument can be made that a defendant's state's discretionary-interest rule should have little force when the airline is a corporation which brings substantial taxes and other revenues to it. Therefore, because of its legitimate desire to protect resident corporations from unfair and duplicative damages

¹⁰¹ The court in *In re Pago Pago Aircrash* of January 30, 1974, 525 F. Supp. 1007, 1015-16 (C.D. Cal. 1981) noted the tendency of prejudgment interest ability to provide a double recovery in certain instances. *Id.* at 1015-16. The court pointed out that the reduction to present value of lost future earnings at the time of trial in 1978, less the amount that the reduction to present value would have been at the time of injury in 1974, approximates the interest the plaintiff would have earned on the post-1978 amount between 1974 and 1978. *Id.* at 1016.

awards, the interest of the airline-related state in forbidding prejudgment interest should be chosen to represent the defendant.

Step 2

The second step requires demonstrating that the airline-state's interest in protecting its resident defendants is entitled to greater weight than the plaintiff's state's authorization of prejudgment interest. This must be done by exposing the plaintiff's state's lack of legitimate interest in awarding the plaintiff prejudgment interest which pays her twice for the passage of time. Whatever the plaintiff's state's interest might be in giving plaintiff this windfall, it cannot be as important as an airline-state's interest in protecting its resident defendants from such excess.

h. Category 2: The Airline's Claims for Prejudgment Interest on Property Damage to Its Aircraft

The logic of permitting an airline, as a plaintiff, to recover prejudgment interest for the loss of its aircraft is very strong. The airline, however, must neutralize its reliance upon any rule against prejudgment interest which it might have urged in regard to pain and suffering and lost wages awards. The airline attorney, having sought an advantage from the rule against prejudgment interest in such cases, must be prepared to deal with the irrationality of a rule which does not permit prejudgment interest, even when it is necessary to complete a plaintiff's compensation. This task should not be difficult. The Restatement's factors are designed to achieve sensible results, not to promote a foolish consistency. Furthermore, the doctrine of depeçage requires the separate treatment of each particular issue. Thus, there is no inconsistency in arguing for a rule against prejudgment interest either when the basic compensatory award already includes payment for the passage of time or when the basic award is for damages which accrue after the judgment, yet arguing

against it when it would prevent complete compensation. This argument demonstrates that the airline-related state which permits prejudgment interest has a substantial interest in protecting a business which brings it significant revenue. Similarly, the airline-related state which does not permit prejudgment interest would seem to have no interest in applying a rule designed to protect its resident defendants in a way which penalizes the airline for choosing to do business there.

From this point, the logic of the argument is clear. To the extent that states connected with the airline's adversary permit prejudgment interest, they provide no obstacle to the choice of the law described above. To the extent they obstruct the assessment of prejudgment interest on the airline's property damage, it must be argued that their unfairness subordinates them to the more reasonable rule of the airline's state permitting prejudgment interest.

i. Category 3: Prejudgment Interest on Contributions
Made to the Airline for Personal Injury
Settlements Previously Paid by the Airline

Let us assume that in addition to those airline-related states hypothesized above, the co-defendant against which the airline ultimately will claim contribution for settlements is connected to jurisdictions which forbid prejudgment interest on such contributions.

In terms of economic logic, the airline's payment of an entire personal injury or wrongful death claim mandates the payment of prejudgment interest by any co-defendant who later becomes liable for the contribution of its part of those damages. Between the time of the airline's payment of the claim and the judgment, the airline has plainly lost interest on the amount it paid on behalf of the other defendant, and the co-defendant's contribution payment for its percentage of fault itself does not include the reimbursement of such interest. If the co-defendant's state permits prejudgment interest, nothing need be added to

the discussion above. If the co-defendant's state forbids prejudgment interest, the argument above for choosing the airline-related state, which permits prejudgment interest over that which does not, applies equally to similar conflicts with a co-defendant's state.

IV. PUNITIVE DAMAGES

A. INTRODUCTION

Like other potential choice of law problems already discussed, our model for choosing the law applicable to punitive damages claims is the *Air Crash Chicago* case. Ironically, the emphasis that *Air Crash Chicago* gives to the consideration of the deterrent effect of state-imposed punitive damages does not comport with reality. Specifically, the standards which shape the conduct of aircraft manufacturers and commercial carriers are the governmental regulations of the United States and those countries who purchase aircraft or entertain their travel within their borders, as well as higher standards imposed by the industry or by the manufacturer or carrier itself. Unfortunately, however, regardless of the merits of a simpler rule, for practical purposes, defending airlines will probably be confined to the kind of reasoning found in *Air Crash Chicago*.¹⁰²

B. *AIR CRASH CHICAGO*

The *Air Crash Chicago* case is helpful in regard to puni-

¹⁰² The lack of state regulation of such matters confirms the exclusive focus upon these less parochial rules. Since this is the case, whatever added deterrence punitive damages can provide toward the fulfillment of these standards surely should be based on such standards and thus be uniform throughout the country.

Acceptance of this reality leaves to the states no legitimate interest in applying local tort standards of conduct. Since *Air Crash Chicago* declares that jurisdictions have no legitimate interest in plaintiffs' receiving punitive damages, and since the individual states' rules on punitive damages are not in fact realistic mediums of influencing conduct, there would seem to be no legitimate interest in states' applying their own punitive damages law. Unfortunately, in regard to air crash disasters at least, the game of conflicts continues to be played by patently arbitrary rules. *Air Crash Chicago*, 644 F.2d at 632-33 (Sprecher, J., commenting on the choice of law applicable to punitive damages).

tive damages claims based upon wrongful death actions in particular and to punitive damages claims in general.¹⁰³ The appeal in *Air Crash Chicago* concerned the validity of the trial court's disposal of McDonnell Douglas Corporation's (MDC) and American Airlines' (American) motion to strike claims for punitive damages arising from the plaintiffs' wrongful death claims. Because all cases had been transferred to the Northern District of Illinois for pretrial purposes by order of the Judicial Panel on Multidistrict Litigation, both the trial court and the appellate court had to begin their choice analyses by identifying the choice rules of the transferror states: Illinois, California, New York, Michigan, Puerto Rico and Hawaii.

C. *AIR CRASH CHICAGO'S* DISCUSSION OF TWO IMPORTANT CHOICE RULES

Among the choice rules which the *Air Crash Chicago* case discusses, two provide the most instructive illustrations of choice analysis: the rules of Illinois and California.¹⁰⁴ The *Air Crash Chicago* court's explanations of these states' choice of law rules governing punitive damages in wrongful death cases may be summarized as follows:

1. *Illinois' Test*

Illinois has adopted the Restatement's "most significant relationship" test, as embodied generally in sections 6 and 145,¹⁰⁵ and sections 175 and 178, which states that

¹⁰³ The fact that the context of the *Air Crash Chicago* court's punitive damages discussion was wrongful death does not diminish the application of its reasoning to punitive damages claimed in other causes of action.

¹⁰⁴ The *Air Crash Chicago* court also applied New York's test, which it said "is the functional equivalent of the Restatement (Second) test, the Illinois test" and those of Michigan, Hawaii, and Puerto Rico. *Air Crash Chicago*, 644 F.2d at 629. In *In re Air Crash Disaster at Sioux City, Iowa*, 734 F. Supp. 1425 (N.D. Ill. 1990), the court discussed in detail the application of both California's and Illinois' choice of law rules and stated: "Since California's governmental interest analysis and the Restatement test [of Illinois] produced the same result for each defendant, it is unnecessary to repeat the analysis with regard to the combined interest tests employed by Pennsylvania and the District of Columbia." *Id.* at 1437.

¹⁰⁵ See *supra* notes 20, 24, 27 and accompanying text.

damages for wrongful death will be governed by "the local law of the state where the injury occurred . . . unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in Section 6 to the occurrence and the parties, in which event the local law of the other state will be applied."¹⁰⁶

2. *California's Test*

California applies the "comparative impairment" analysis to choice of law questions. The first step is to identify the states which have interests relevant to the precise issue. In *Air Crash Chicago* these states were: the defendants' principal places of business, the places of their alleged misconduct and the place of the accident.¹⁰⁷

The second step is to examine the interested states' laws on the particular issue to determine what conflicts exist. Apparent conflicts may be resolved if it can be demonstrated that "a 'moderate and restrained interpretation' of both the policy and the circumstances reveals that only one state has a legitimate interest in the application of its policy."¹⁰⁸

If there are actual conflicts, California requires the court

to determine the relative commitment by each interested state to the law involved. This examination of the relative commitment examines two factors: (1) the current status of a statute and the intensity of interest with which it is held; and (2) the "comparative pertinence" of the statute: the "fit" between the purpose of the legislature and the situation in the case at hand.¹⁰⁹

¹⁰⁶ *Air Crash Chicago*, 644 F.2d at 611-12 nn.16-18; RESTATEMENT, *supra* note 6, §§ 6, 145, 175, 178.

¹⁰⁷ *Air Crash Chicago*, 644 F.2d at 622.

¹⁰⁸ *Id.* at 621 (quoting *Bernhard v. Harrah's Club*, 546 P.2d 719, 723 (Cal. 1976)).

¹⁰⁹ *Id.* at 622 (footnotes omitted) (citing *Offshore Rental Co. v. Continental Oil Co.*, 583 P.2d 721, 726-27 (Cal. 1978)).

D. AVOIDING A DEFAULT TO THE LAW OF THE PLACE OF
THE ACCIDENT WHEN THE AIRLINE'S PLACE OF
MISCONDUCT AND PRINCIPAL PLACE OF
BUSINESS HAVE OPPOSING
PUNITIVE DAMAGES RULES

In some cases, the airline attorney will wish to avoid the *Air Crash Chicago* case's deferral by default to the accident state's law. The attempt must challenge the validity of the stalemate upon which the court relied.

1. *The Problem*

In weighing the interests of MDC's principal place of business, Missouri, and the place of MDC's alleged misconduct, California, the *Air Crash Chicago* court determined that Missouri's goal of allowing punitive damages in wrongful death cases was equal to California's interest in protecting against imposing punitive damages in wrongful death cases.¹¹⁰ The court also found that Missouri's theoretical ability to accomplish its goals by criminal prosecution of MDC was equally balanced with the fact that California's policy of financial protection theoretically could be achieved through insuring against punitive damages, a practice permitted in California.¹¹¹ Because it deemed Missouri's and California's conflicting interests to be equal, the court applied the law of Illinois, the place of injury. It is likely that a compelling argument from a defending airline would be necessary to prevent a court's application of a similar default rule under the Restatement's "most significant relationship" test.

The interests which must be addressed are: 1) the place of an airline's alleged misconduct permits punitive damages; 2) the airline's principal place of business forbids them; and 3) the place of the accident permits them. Under *Air Crash Chicago*, the two airline-related states' opposing rules cancel each other out and prompt a default

¹¹⁰ *Id.* at 615.

¹¹¹ *Id.* at 614-15.

to the unfavorable law of the accident state. This undesirable result might be avoided.

2. *A Solution*

The *Air Crash Chicago* case concerned motions to dismiss the punitive damage claims because of their insufficiency as a matter of law. At that stage, there presumably were no facts before the court to indicate why either airline-related state might have a dominant interest in the matter. However, if it could be shown that the alleged misconduct consisted of the accurate fulfillment of policies formulated by the airline's principal office, a strong argument could be made that because the principal place of business was host to the conduct generating the alleged injury, it has a greater interest in the matter than does the misconduct-state, where the policy decision was merely implemented.¹¹²

The court in *In re Air Crash Disaster at Sioux City, Iowa*¹¹³ achieved a similar result concerning United Airlines by: 1) stating that it was more likely that injury would occur in United's hub in Illinois than in California or Colorado, the states where misconduct in regard to maintenance or training might have occurred and 2) recharacterizing allegations concerning United's wrongful conduct as "permitting passengers to travel upon a faulty aircraft flown by an ill-trained crew."¹¹⁴ The court's solution provides a striking illustration of the fact that, in regard to large, national corporations, there is no single acceptable definition of concepts like "misconduct."

¹¹² This argument, of course, harbors its own fiction. In all likelihood, the airline officials making the decisions are much less concerned with the host state's rule on this matter than they are, for example, in instructing their local personnel about the host state's health codes.

¹¹³ 734 F. Supp. 1425 (N.D. Ill. 1990) [hereinafter *Air Crash Sioux City*].

¹¹⁴ *Id.* at 1432-33, 1435-36.

E. FACTORS TO CONSIDER IN NEUTRALIZING AN
UNFAVORABLE PUNITIVE-DAMAGES RULE OF THE
ACCIDENT STATE

Plainly, it will frequently be to a defending airline's advantage to minimize the accident state's interest in punitive damages. For example, assume that the states of both the airline's alleged misconduct and its principal place of business have rules protecting defendants doing business in those states from punitive damages while the accident state permits liberal punitive damages. *Air Crash Chicago* provides the grounds for arguing the dominance of the interests of the airline-related states.

First, the court in *Air Crash Chicago* turned to Illinois law only after it found that the interests of the two states connected with the defendants had directly opposite interests regarding punitive damages in wrongful death claims.¹¹⁵ Therefore, if the defendant's principal place of business and the alleged place of misconduct both disallow punitive damages in wrongful death claims, resort to the accident state's law would seem technically unnecessary.¹¹⁶ Nevertheless, to be safe, the defending airline must still show the relative insignificance of the accident state's interest. The following points may be of use in this endeavor.

1. *Fortuitousness of the Locale of the Accident*

The *Air Crash Chicago* court pointed out that historically the *lex loci delicti* rule developed from the fact that there was nothing fortuitous about an injury's occurrence in a particular jurisdiction.¹¹⁷ The court observed, however, that "air crash disasters often present situations where the

¹¹⁵ *Air Crash Chicago*, 644 F.2d 594, 615, 620-21, 625, 628 (7th Cir.), cert. denied, 454 U.S. 878 (1981).

¹¹⁶ An important basis for this result is, of course, the fact that because air crashes can happen in any number of jurisdictions, the state where the injury occurred does not have as substantial a connection with the accident as it has to accidents arising from conduct more confined to its borders. See *id.* at 615.

¹¹⁷ *Id.*

place of injury is largely fortuitous.”¹¹⁸ The court then stated:

Because the place of injury is much more fortuitous than the place of misconduct or the principal place of business, its interest in and ability to control behavior by deterrence or punishment, or to protect defendants from liability, is lower than that of the place of misconduct or principal place of business.¹¹⁹

The court continued to say that, “merely as the place of injury, Illinois would not have strong interests in protecting nonresident defendants from excessive financial liability.”¹²⁰

BUT BEWARE: The converse of this rule is not so well-founded. It does not follow from the fact that the place of injury has no strong interest in protecting nonresident defendants from excessive liability that the place of injury has an equally weak interest in deterring defendants from the kind of behavior supporting punitive damages. In fact, the *Air Crash Chicago* court stated that although Illinois’ interest as the place of injury is not as great as the interest of the principal place of business and the interest of the alleged misconduct, Illinois nevertheless “has very strong interests in not suffering air crash disasters and also in promoting airplane safety [albeit, interests which it chooses not to exercise when it rejects wrongful-death punitive damages].”¹²¹

SOLUTION: It can be argued, however, that as the following quote demonstrates, an integral element in the *Air Crash Chicago* court’s reasoning was the obvious fact that many of the decedents resided in Illinois.¹²² This factor is related to the fact that the crash of American Flight 191

¹¹⁸ *Id.* (citing *Cousins v. Instr. Flyers, Inc.*, 376 N.E.2d 914, 915 (N.Y. 1978)).

¹¹⁹ *Id.* at 615.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Unfortunately, the court does not specify how many decedents resided in Illinois. But because 118 wrongful death actions were filed in only six transferror states and because the flight originated in Chicago, it is fair to assume that a large number of the deceased passengers were Illinoisans.

occurred seconds after take-off, a procedure that, coupled with landing, produces the majority of air crashes.¹²³ Both factors gave Illinois a degree of interest in the deterrent purpose of wrongful-death punitive damages, which a lesser number of accident-state domiciliaries should not confer upon that state.¹²⁴

The fact that Illinois has chosen not to exercise this method of deterrence but rather to protect defendants from punitive damage liability is immaterial to the theory of this argument. It is the *Air Crash Chicago* court's assessment of the degree of Illinois' potential interest in deterrence that counts. If the accident state has chosen deterrence, it will be necessary to address and attempt to distinguish *Air Crash Chicago*'s evaluation of the strength of this interest.

Airline defense counsel should be familiar with the factors that the *Air Crash Chicago* court discussed in choosing the punitive damages law of Illinois, the accident site:

[I]n this case Illinois is more than merely the place of injury. As noted before, many of the other contacts of significance were in Illinois. With regard to the actions filed in Illinois, all but two of the decedents resided in Illinois. As the home of O'Hare International Airport, one of the world's busiest airports, Illinois certainly has strong interests in encouraging air transportation corporations to do business in the state.

Because Illinois has such strong interests in promoting airline safety, it would have a strong interest in allowing punitive damages to deter corporate misconduct relating

¹²³ Recent data from the National Transportation Safety Board shows that during the period 1983-1987, 42.1% of all Part 121, 125, 127 airline accidents occurred during the standing, taxi, takeoff and climb phase of operation, and 33.1% occurred during the descent, approach and landing phase. In contrast, 19.4% of the accidents occurred during the cruise phase. During the years 1983-1987, 47.4% of the fatal accidents occurred during the standing, taxi, takeoff and climb phase, 31.6% occurred during descent, approach and landing, and 10.5% occurred during the cruise. NTSB, ANN. REV. OF AIRCRAFT ACCIDENT DATA, U.S. GENERAL AVIATION, CALENDAR YEAR 1987 (1989).

¹²⁴ The fact that, as a practical matter, state laws do not shape the conduct of aircraft manufacturers and carriers is immaterial to the *Air Crash Chicago* analyses necessary to the air crash cases. See *supra* notes 66-89 and accompanying text.

to air safety. But because Illinois also has such strong interests in having airlines fly into and out of the state, and having related transportation companies do business within the state, it would have a strong interest in protecting air transportation companies by disallowing punitive damages. Thus, the decision made by the Illinois legislature [forbidding punitive damages in wrongful death actions] must be accorded special weight.¹²⁵

A comparison of these contacts with those in potential crashes yields the following possible considerations supporting the rejection of the accident state's interest—or in appropriate cases, its acceptance.

2. *The Accident and Its Aftermath*

The contacts of the accident itself and its post-accident emergency relief and services will exist in every air crash disaster.

3. *Decedents' Residency*

Although *Air Crash Chicago* explicitly holds that the plaintiffs' domiciliary states have no legitimate interest in disallowing or imposing punitive damages,¹²⁶ the passage quoted above seems to give some weight to the fact that many of the decedents resided in Illinois. As explained in subsection 1, this weight can be justified on the ground that the substantial number of Illinois residents conferred upon Illinois an interest in the deterrent effect of wrongful-death punitive damages. This factor will probably be absent in air crashes occurring in one of the several states over which commercial passenger flights frequently fly.

4. *The Air Crash Chicago Flight's Takeoff in Illinois*

In *Air Crash Chicago* the flight originated in Illinois, a fact which arguably gave Illinois more contact with the accident than that possessed by accident states which are not

¹²⁵ *Air Crash Chicago*, 644 F.2d at 615-16.

¹²⁶ *Id.* at 612-13.

the point of take-off or landing. As it has been noted, the NTSB statistics show that by far the greatest numbers of air crashes occur during these maneuvers. In addition, as the *Air Crash Chicago* court noted, O'Hare Airport is one of the world's busiest airports.¹²⁷ Indeed, the high volume of O'Hare Airport's business far surpasses that of most airfields that might be the unfortunate host to an air crash. If the particular accident site is not such an air transportation hub, the possibility (as unlikely as it is in any case),¹²⁸ that it could exert any deterrent power over an airline's conduct diminishes.

V. COMPENSATORY DAMAGES

Although some courts have spoken of the deterrent effect of compensatory damages,¹²⁹ the better reasoning makes a complete separation between punitive and compensatory damages. For example, in *Reich v. Purcell*¹³⁰ the California Supreme Court stated:

Limitations of damages for wrongful death . . . have little or nothing to do with conduct. They are concerned not with how people should behave but with how survivors should be compensated. The state of the place of the wrong has little or no interest in such compensation when none of the parties reside there.¹³¹

The choice of the law of the plaintiff's domicile is the most sensible solution to conflicts concerning compensa-

¹²⁷ *Id.* at 615.

¹²⁸ See *supra* text accompanying note 119.

¹²⁹ See, e.g., *Scott v. Eastern Airlines, Inc.*, 399 F.2d 14, 23 (3d Cir.), *cert. denied*, 393 U.S. 979 (1968); *Schulhof v. Northeast Cellulose, Inc.*, 545 F. Supp. 1200, 1207-08 (D. Mass. 1982); *Jennings v. Boeing Co.*, 660 F. Supp. 796, 808 (E.D. Pa. 1987), *aff'd per curiam*, 838 F.2d 1206 (3d Cir. 1988).

¹³⁰ 432 P.2d 727 (Cal. 1967).

¹³¹ *Id.* at 730-31. See also *Gordon v. Eastern Airlines, Inc.*, 391 F. Supp. 31, 33 (S.D.N.Y. 1975), in which the court rejected the law of the state where the plane crashed. The court distinguished the choice of law analyses applicable to conduct and compensation, stating that when considering the extent of recovery "where the sole issue at bar is the measure of plaintiff's damages—the court must apply the law of the place which has the dominant contacts with the parties and transaction and the superior claim for application of its law." *Id.*

tory damages.¹³² The reason is that the plaintiff's state has the most significant interest in the compensation of its domiciliaries.¹³³ It is inconceivable that a plaintiff's state's limits upon compensation¹³⁴ can be said to constitute a desire to give its residents less than complete compensation.¹³⁵ Rather, such limits embody the state's

¹³² In mass disasters, it will be simpler to relate all compensatory questions to the law of the particular *passenger's* domicile rather than becoming enmeshed in treating the laws of the domiciles of various plaintiffs who have causes of action. This solution, however, can be challenged on the grounds that it neglects the most basic reason for choosing the plaintiff's domicile—the plaintiff's state's interest in ensuring that its residents receive proper relief and thus avoid becoming wards of the state. See *Hernandez v. Burger*, 162 Cal. Rptr. 564, 567 (Cal. Ct. App. 1980); *Halstead v. United States*, 535 F. Supp. 782, 788 (D. Conn. 1982), *aff'd*, *Saloom v. Jeppeson & Co.*, 707 F.2d 671 (2d Cir. 1983). It would appear that in Multidistrict Litigation it would be more likely that the MDL court would accept such a simplification than would transferor courts which handle individual cases after retransfer from the MDL court.

¹³³ See, e.g., *Reich v. Purcell*, 432 P.2d 727 (Cal. 1967); *Gordon v. Eastern Airlines, Inc.*, 391 F. Supp. 31 (S.D.N.Y. 1975).

¹³⁴ For example, see Colorado's ceiling on the amount recoverable for non-economic losses in wrongful death actions. See *supra* note 68.

¹³⁵ In *Gordon*, the court rejected the compensatory damages measurement of the state, which was both the site of the accident and of the airline's principal place of business, in favor of the more limited damages of the decedent's domicile. *Gordon*, 391 F. Supp. at 34. The court noted that "the failure to apply New York law in this case would 'impair the smooth working of the multi-state system [and] produce great uncertainty for litigants by sanctioning forum shopping . . . thereby allowing a party to select a forum which could give him a larger recovery than the court of his own domicile.'" *Id.* (footnote omitted) (quoting from *Neumeier v. Kuehner*, 286 N.E.2d 454, 458 (N.Y. 1972)).

In *Howe v. Diversified Builders, Inc.*, 69 Cal. Rptr. 56 (Cal. Ct. App. 1968), a Nevada plaintiff sued California corporations for personal injuries occurring in Nevada. The court affirmed the summary judgment for the defendants, holding that Nevada's exclusive workmen's compensation barred the suit. In refusing to apply California's more liberal law, the court stated:

California has no interest in extending to Nevada residents greater rights than are afforded them by the state of their domicile. . . . [N]o California "interest" would be promoted by impairing the ability of California corporations to compete for business in other states by imposing upon them obligations to the residents of such states which those states do not impose upon foreign corporations or their own domestic corporations.

Id. at 59.

Similarly, in *Ryan v. Clark Equip. Co.*, 74 Cal. Rptr. 329 (Cal. Ct. App. 1969), the court rejected the plaintiff's claim that the more liberal law of the manufacturer's state, Michigan, should govern the plaintiff's wrongful death suit. The court applied the law of Oregon, the place of the decedent's and his family's residency, which foreclosed the suit. Citing *Reich* and *Howe*, the court stated:

policy not to unduly burden defendants, including corporations doing business within its borders.

The defendant's state is clearly not as closely connected to compensation as the plaintiff's state. The defendant state has no interest in benefitting a foreign plaintiff with a more generous recovery than the plaintiff's own state permits. Conversely, the defendant who benefits from business conducted with plaintiffs from other states can hardly complain about being subject to the compensatory damages imposed by those states.

An application of the Restatement's choice of law principles to the issue of compensatory damages follows.

A. APPLICATION OF SECTION 6'S GENERAL FACTORS TO
THE ISSUE OF COMPENSATORY DAMAGES SOUGHT
AGAINST BUSINESSES OPERATING
NATIONWIDE

1. Needs of the Interstate and International Systems

There can be no disruption of the interstate system when the plaintiffs are accorded the compensatory recovery permitted by their own domiciliary states. Similar rules embraced by both the plaintiff's state and the defendant's state obviously present no problem. If the defendant benefits from substantial business in the plaintiff's state, the defendant's state has no legitimate complaint when the plaintiff's state permits a greater recovery than it does.¹³⁶ Conversely, the defendant's state can have no legitimate complaint if the plaintiff's state

"Neither California nor Michigan has any interest in extending to Oregon residents any greater rights than are afforded by the state of residence." *Id.* at 331-32. The court added, "to apply the law of Michigan on the facts of this case is to encourage forum shopping by litigants." *Id.* at 332.

Because compensation has nothing to do with conduct, the fact that in both *Howe* and *Ryan* the accident occurred in the plaintiffs' states as a result of operations there, does not diminish the application of the reasoning of these cases to others in which the accident happened elsewhere.

¹³⁶ See *Pacific Diamond Co. v. Superior Court of San Francisco*, 85 Cal. 3d 871, 876 n.1 (Cal. Ct. App. 1978).

grants greater protection to businesses within its borders than does the defendant's state.

2. *The Relevant Policies of the Forum*

The states with the most intimate connection to issues of compensatory damages are the ones with the most direct interest in the plaintiff's monetary recovery and/or the most direct interest in protecting the defendant against financial hardship. These considerations point to the plaintiff's and defendant's domiciliary states. Although a forum state which is not also the domicile of either the plaintiff or the defendant may have an interest in compensatory damages, this interest is inferior to the interests of either the plaintiff's state or the state of the defendant's principal place of business.

First, the fact that a forum state's recovery may be less than the amount permitted by the plaintiff's state does not negate the reality that, by doing business in the plaintiff's state, the defendant subjects itself to that standard of care for its residents. Any desire by the forum state to protect businesses from undue economic burdens must yield to the plaintiff's state's interest in protecting its residents.

Second, if the plaintiff's state permits less compensation than does the forum state, the latter plainly has no interest in burdening the defendant with a recovery that the plaintiff's own state does not consider warranted.

In air crash cases, some plaintiffs might be tempted to choose a forum with a more liberal compensatory rule than that of their domiciliary states. In rejecting the compensatory damages rule of the state of both the accident and the airline's principal place of business in favor of the more limited damages of the decedent's domicile, the court in *Gordon v. Eastern Air Lines, Inc.*¹³⁷ noted that to do otherwise would encourage forum shopping.¹³⁸ A forum

¹³⁷ 391 F. Supp. 31 (S.D.N.Y. 1975).

¹³⁸ *Id.* at 34.

state surely has no more interest than that of the state which hosts both the accident and the defendant's principal place of business as was the case in *Gordon*. The discussion of Section 145's contacts in subsection B demonstrates that the forum state, as such, gains no legitimate interest in addition to that which it has if it is one of the party's domiciles.

3. *Relevant Policies and Interests of Other Concerned States*

The significance of the interests of states other than the forum—place of accident, place of alleged misconduct, center of the parties' relationship, parties' domiciles—will be covered in the discussion of section 145's contacts.

4. *The Remaining Factors of Section 6*

The defending airline's discussion of the actual domiciliary interests in a case should demonstrate that the application of the compensatory damages rules of the passengers' states will certainly protect justified expectations, serve the basic policies of compensatory damages, and foster certainty, predictability, and uniformity of result as well as ease in the determination and application of law. Indeed, in air crash litigation, at least two factors compel the application of the compensatory damages law of the injured or deceased passenger in order to avoid unnecessary and unjustifiable complication.

a) A plaintiff may recover against more than one defendant, each having a different domicile and a different site of wrongful conduct. In such a situation, the adoption of the compensatory damages rule of the passenger's domicile will avoid the anomaly of attempting to apportion damages among defendants whose liability is measured under differing standards.

b) In the case of a deceased passenger whose heirs may reside in a number of states, the adoption of the passenger's domicile will avoid the necessity of applying a variety

of different compensatory damages standards.¹³⁹

B. APPLICATION OF SECTION 145'S CONTACTS TO
COMPENSATORY DAMAGES IN AIR CRASH
LITIGATION

Three of section 145's four contacts—(1) the place of injury, (2) the place of the conduct causing the injury, and (3) the place where the relationship between the parties is centered—are not significant to the issue of compensatory damages limitations.

1. *The Irrelevance of the Compensatory Law of the Place of Injury*

The place of the injury, as such, has no legitimate interest which could be implemented by applying its compensatory measurements to this case. Although a defending airline will most likely serve the accident state, this fact does not give the state a significant interest in imposing a liberal damages rule in favor of non-resident plaintiffs and to the detriment of a corporation which contributes substantially to its economy. In the first place, unlike punitive damages, compensatory damages are properly considered not as deterring future actions but as measuring relief once liability has been determined. But even if the imposition of the accident state's compensatory standards could be considered a deterrent to conduct in some instances, it could not be so considered in a case in which the site of the accident's occurrence was fortuitous.¹⁴⁰

2. *Irrelevance of the Compensatory Law of the Place of Misconduct Causing the Injury*

The place of the conduct causing the injury is irrelevant

¹³⁹ But see *supra* note 132.

¹⁴⁰ See *Air Crash Sioux City*, 734 F. Supp. 1425, 1431, 1435 (N.D. Ill. 1990). In *Kaczmarek v. Allied Chem. Corp.*, 836 F.2d 1055, 1058 (7th Cir. 1987) and *Kozoway v. Massey-Ferguson, Inc.*, 722 F. Supp. 641, 643 (D. Colo. 1989), the courts applied the doctrine of fortuity to personal-injury claims inflicted by trucking equipment and farm machinery, respectively.

because compensatory damages do not properly concern conduct.¹⁴¹ Although some courts consider compensatory damages to be a deterrent,¹⁴² this view seems fundamentally flawed, for it is based upon the untenable assumption that differences in states' compensatory limits reflect varying degrees of commitment to their residents' safety. In reality, it is the differing substantive standards of care which constitute states' differences concerning the degree of safety they demand. Once a state has defined its tort standard of care, it cannot reasonably be said that any limits upon compensatory recovery exhibit a diluted commitment to this standard of care.¹⁴³

3. *Difficulty of Identifying the "Center of the Parties' Relationship" and Any Such Place's Lack of Significant Interest in Compensatory Damages*

In air crash cases "[i]t is unclear where the relationship of the parties is 'centered.'"¹⁴⁴ Even in regard to more local airline operations, the center of the parties' relationship does not merit much consideration.¹⁴⁵ In the case of an international airline such a consideration is even more unrealistic. The ability of passengers to purchase tickets almost anywhere in the world for flights originating and terminating anywhere else renders the locus of a particular passenger's pre-flight dealings with an airline unimportant if not fortuitous. Certainly, purchasing of a ticket

¹⁴¹ *Gordon v. Eastern Airlines, Inc.*, 391 F. Supp. 31, 33 (S.D.N.Y. 1975); *Reich v. Purcell*, 432 P.2d 727, 730-31 (Cal. 1967).

¹⁴² See *supra* note 129.

¹⁴³ See *Long v. Pan Am. World Airways, Inc.*, 213 N.E.2d 796, 798 (1965); *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1175 (5th Cir. 1987) (Gee, J., dissenting), *vacated*, *Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989).

¹⁴⁴ *Air Crash Chicago*, 644 F.2d 594, 612 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981).

¹⁴⁵ See *Bonn v. Puerto Rico Int'l Airlines, Inc.*, 518 F.2d 89, 92 (1st Cir. 1975) (per curiam), *disapproved by* *Donovan v. Shipping Co.*, 429 U.S. 648 (1977), in which the court stated that "[A]lthough one factor in contacts analysis is 'the place where the relationship is centered' i.e., . . . where the tickets were bought, such a factor does not, in this kind of relationship, warrant a heavy weight in the scales." *Id.*; see also *Bryant v. Silverman*, 703 P.2d 1190, 1195 (Ariz. 1985).

on a commercial flight does not constitute the kind of activity for which "the center of the parties' relationship" was designed to account, namely, activities to which some *local* legal standard has reason to attach.

Furthermore, the impossibility of assigning a meaningful center of the relationship between interstate passengers and airlines frustrates the "justified expectation", the "certainty, predictability and uniformity of result", and the "ease in the determination of the law to be applied" which the Restatement desires. Finally, if it is necessary to assign a locus of relationship apart from the plane itself, the better option is to consider the passenger's domicile—where the passenger at least begins or ends the journey. An arbitrary center could not have legitimate interests in compensatory damages standards equal to that of the domiciliary states.

The irrelevance of the foregoing three contacts leaves only one of Section 145's contacts to be considered, the interests of the passengers' and the airline's residences.

4. *Plaintiff's State's Paramount Interest in Measuring Its Residents' Compensation and In Enforcing Any Rules Which Protect the Business Conducted Within the State*

A defendant's state plainly has no interest *per se* in maximizing a non-resident plaintiff's compensatory recovery. In *Gordon v. Eastern Air Lines, Inc.*,¹⁴⁶ the court refused to apply the liberal damages rule of Florida, the state of both the accident and Eastern's principal place of business. The court said, "[s]ince the issue of defendant's conduct is not here involved, Florida has no interest in the application of its [more liberal] law to the narrow issue of damages before the court simply because the accident occurred within its borders."¹⁴⁷ Because conduct was not in issue, the court also discounted Florida's possible inter-

¹⁴⁶ 391 F. Supp. 31 (S.D.N.Y. 1975).

¹⁴⁷ *Id.* at 33.

est in promoting tourism with the potential deterrent of its liberal damages rule.¹⁴⁸ Though some cases deviate from this norm, their particular grounds may be easily distinguishable from most litigation which is likely to arise against a major airline.¹⁴⁹

The plaintiff's state has an essential interest in its resident's recovery for actual pecuniary loss. In addition, the plaintiff's state may wish to protect entities conducting business within its borders by putting limits on compensatory awards. The former interest is a common one shared by all states in regard to their domiciliaries: to ensure that plaintiffs receive proper relief for pecuniary loss and avoid becoming wards of the state.¹⁵⁰ Any limitation upon compensatory awards embodies the plaintiff's state's concur-

¹⁴⁸ *Id.*; see also *Huang v. Lee*, 734 F. Supp. 71, 74-75 (E.D.N.Y. 1990); *Hernandez v. Burger*, 162 Cal. Rptr. 564, 567 (Cal. Ct. App. 1980).

¹⁴⁹ Although some decisions apply the defendant-state's more liberal damages rule instead of the plaintiff-state's more restricted rule, they do so because the plaintiff's state has absolutely no interest in protecting the defendant, because the court deems that its interest as forum to be of great importance, or because the court perceives the place of defendant's conduct to be important. For example, in *Hurtado v. Superior Court*, 522 P.2d 666, 670 (Cal. 1974), the court stated that Mexico had no interest in applying its limitations of damages rule to its domiciliary plaintiffs injured by non-Mexican defendants. However, the individual California defendant had no connection to Mexico which could have even suggested the possibility that Mexico's limitations were for his protection. In *Hurtado*, Mexico's lack of interest resulted in the adoption of the forum's damages measurement. This adoption, however, was not merely the result of Mexico's default: the court also relied on the fact that the California defendant's tortious conduct occurred in California. *Id.* at 672-74. In *Bonn v. Puerto Rico Int'l Airlines, Inc.*, 518 F.2d 89, 92 (1st Cir. 1975), the court, citing *Hurtado*, speaks of the presumption that the law of the forum should apply. Application of any such presumption in the present case would encourage forum shopping. See discussion above.

¹⁵⁰ See *Halstead v. United States*, 535 F. Supp. 782, 788 (D. Conn. 1982), *aff'd*, *Salomey v. Jeppesen & Co.*, 707 F.2d 671 (2d Cir. 1983); *Hernandez*, 162 Cal. Rptr. at 567. In both *Halstead* and *Feldman v. Acapulco Princess Hotel*, 520 N.Y.S.2d 477, 486 (N.Y. Sup. Ct. 1987) the courts rejected the domiciliary states' interest in their plaintiffs' recovery in favor of the more limited damages rule of the defendants' jurisdictions. In *Halstead*, the court stated that the plaintiff's state had little interest in burdening the defendant with liability in excess of the actual losses sustained by the survivors. *Halstead*, 535 F. Supp. at 788-89. In *Feldman*, the court stated that New York's interests in ensuring that its medical creditors will be paid and that its injured domiciliaries will not become wards of the state are undercut by the widespread availability of travel and medical insurance. *Feldman*, 520 N.Y.S.2d at 491. The court deferred to Mexico's interest in encouraging the resort industry by limiting its potential liability. *Id.* This reasoning, of course,

rent desire to protect and encourage business within its borders. Indeed, the *Air Crash Chicago* court recognized that a plaintiff's state might have a considerable interest in enforcing a rule which protected airlines providing transportation services to the state, even if to do so would disadvantage its residents.¹⁵¹

A major airline will likely serve most if not all of the states where passengers reside. If a passenger's state's rule maximizes recovery, the airline must bear the responsibility attendant upon its conduct of business there.¹⁵² By the same token, however, if a passenger's state seeks to encourage and protect business within its borders by limiting compensatory damages, the airline must not be put at a relative disadvantage simply because it is a resident of another state. The refusal of some courts to apply a plaintiff's state's compensatory limitations to foreign defendants reflects one of three things: 1) either facts different from those in the present case;¹⁵³ 2) particularly unwieldy

cannot be applied when the defendant's principal place of business puts no such limits upon recovery.

¹⁵¹ See *Air Crash Chicago*, 644 F.2d 594, 615-16 (7th Cir.), cert. denied, 454 U.S. 878 (1981). The court noted that although Illinois, the residence of many of the crash victims had a strong interest in promoting airline safety by means of a punitive damages rule, it also has strong interests in encouraging air commerce with its protective rule against punitive damages. *Id.*

¹⁵² See, e.g., *Pacific Diamond Co. v. Superior Court*, 149 Cal. Rptr. 813, 816 n.1 (Cal. Ct. App. 1978).

¹⁵³ In *O'Rourke v. Eastern Airlines, Inc.*, 730 F.2d 842 (2d Cir. 1984), the court stated that New York would not apply the more favorable damages law of Greece to favor the Greek plaintiff where New York was the forum state, the tortious conduct occurred in New York, the defendants had "substantial contacts with the state, and it was plain they did not have similar connections to Greece." *Id.* at 850-51.

Although in *Barkanic v. General Admin. of Civil Aviation of the People's Republic Of China*, 923 F.2d 957 (2d Cir. 1991) the court held that under New York choice-of-law the Chinese limitation governed the New York plaintiff's compensatory damages, this ruling is not applicable to the present case. In *Barkanic*, the court stated that since the defendant had absolutely no connection to New York, there was no basis to support the application of New York's more liberal damages measurement. *Id.* at 964. Instead, the court relied on a New York case between individual parties which stated that when an automobile driver's conduct and the resulting accident occurred in his own state, that state's guest statute must be applied to prevent his liability. *Id.* at 962. Even if *Barkanic* had the force of New York law, its ruling should not extend to an aircraft crash involving a major airline

problems in the number of plaintiff's residencies and accessibility of their resident jurisdiction's laws;¹⁵⁴ or 3) questionable reasoning.¹⁵⁵ In any case, the plaintiff has no reasonable complaint about compensation which is the

conducting extensive business in each of the victims's states. Such a case involves not only the plaintiff's states' interest in having its domiciliaries properly compensated but any concurrent interest in protecting the business conducted within its borders. The fact that compensatory damages do not properly concern conduct confirms the importance of an injured person's state's particular balance between proper compensation and protection of economic activity.

Decisions sometimes state that limitations upon compensatory recovery are for the benefit of resident defendants only. See, e.g., *Hurtado v. Superior Court of Sacramento County*, 522 P.2d 666, 671 (Cal. 1970); *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 168 n.76 (3d Cir. 1980), *rev'd on other grounds*, 454 U.S. 235 (1981); *In re Paris Air Crash*, 399 F. Supp. 732, 743 (C.D. Cal. 1975). When the defendant has no connection to the plaintiff's state, such language is merely the vehicle for the sensible exclusion of the plaintiff-state's limitations. *Reyno*, 630 F.2d at 168 n.76; *Hurtado*, 522 P.2d at 670-72. When the defendant does substantial business in the plaintiff's state, however, this reasoning does not apply. A state's limitations upon damages must be regarded as protecting all businesses which bring economic benefit to the state. Therefore, it would make no sense to dismiss that state's interest just because the defendant's principal place of business happens to be elsewhere.

¹⁵⁴ Although *Paris Air Crash* cites *Reich v. Purcell*, 432 P.2d 727 (Cal. 1967), and *Hurtado* to support its ruling that foreign jurisdictions would have no interest in limiting their residents' recovery, *Paris Air Crash*, 399 F. Supp. at 742-43, the reasoning in these cases does not extend either to the situation in *Paris Air Crash* or to that of the present case. In *Reich* it was the place of the accident which had no interest in limiting the non-resident plaintiff's recovery against the non-resident defendant. *Reich*, 432 P.2d at 731. In *Hurtado* the individual California defendant had absolutely no connection to Mexico, the plaintiffs' domicile. *Hurtado*, 522 P.2d at 670. In *Paris Air Crash* the difficulties of dealing with the laws of twenty four foreign jurisdictions and twelve states gave the court a decisive incentive to look to the law of California, the forum as well as the place of the conduct upon which the court focused. See *Paris Air Crash*, 399 F. Supp. at 744.

¹⁵⁵ In *Bonn v. Puerto Rico Int'l Airlines, Inc.*, 518 F.2d 89 (1st Cir. 1975), beneficiaries sued Puerto Rico International Airlines for recovery for their Virgin Islands decedents' deaths in a crash occurring in Puerto Rico. In refusing to apply the Virgin Islands' limitations upon damages, the court acknowledged that the Virgin Islands may have had some interest in protecting the airlines, which was doing business there, from large recoveries. *Id.* at 92. But the court stated that the airline did much more business in Puerto Rico and was also domiciled and managed there. *Id.* It is plain, however, that the court's guiding assumption was that Puerto Rico had a superior, deterrent interest in applying its law. *Id.*

The elimination of this flawed assumption leaves Puerto Rico with no interest in burdening its resident defendant in favor of foreign plaintiffs, and the Virgin Islands' interest in its domiciliaries' recovery and in protecting business within its borders was paramount. In addition, plaintiffs' suit in the defendant's state permitted the court to find support in the importance of the forum, an importance

same as it would have been had the accident been a purely local one.¹⁵⁶

In sum, the most sensible application of the Restatement's standards is to apply the law of the injured person's domicile to all issues concerning the availability and measurement of compensatory damages.

VI. CONTRIBUTION

It is difficult to endorse enthusiastically the traditional rule that the right to equitable contribution is governed by the law of the place of the tort.¹⁵⁷ This is because contribution has nothing to do with conduct, the consideration which most strongly invokes the law of the place of the tort. It is equally difficult, however, to formulate a sensible approach to the solution of conflicts in equitable

that in the present case would promote and reward forum-shopping. See *Gordon v. Eastern Airlines, Inc.*, 391 F. Supp. 31, 34 (S.D.N.Y. 1975).

In *Judge v. American Motors Corp.*, 908 F.2d 1565 (11th Cir. 1990) a Mexican plaintiff sued Michigan corporations for wrongful death resulting from an automobile accident in Mexico. In refusing to apply Mexico's proscription of wrongful death actions, the court stated that while Mexico's rule might reveal a desire to protect non-resident business, the record contained no evidence which could satisfy the causal link between its protectionist rule and the defendant's decision to do business in Mexico. *Id.* at 1572-73. This causal requirement rests on the court's unsupported assumption that Mexico intended to extend its protection only to those businesses for whom it is the decisive factor. The cumbersome speculation which such an inquiry would require can only be explained by the court's obvious desire to avoid the inequitable result of applying Mexico's law. See *id.* at 1574-75.

In *Lewis-DeBoer v. Mooney Aircraft Corp.*, 728 F. Supp. 642 (D. Colo. 1990) the court ruled against applying Colorado's caps on wrongful death and personal injury damages to Colorado residents and instead applied the more liberal measure of Texas, the principal place of the defendant's business. *Id.* at 646. In its statement, "there is no injustice to a corporation in applying the law of the state where it has chosen to locate its principal place of business," the court seems unaware that the uniform acceptance of its rule would likely encourage state legislatures to enter a damage-reduction sweepstakes in order to attract businesses. *Id.* (quoting *Kozoway v. Massey-Ferguson Inc.*, 722 F. Supp. 641 (D. Colo. 1989)). Such a result would surely disrupt the appropriate balance between states' desire to fully compensate injured parties and to protect businesses from undue burdens.

¹⁵⁶ See *De Foor v. Lematta*, 437 P.2d 107, 109-10 (Or. 1968).

¹⁵⁷ See E. H. Schopler, Annotation, *What Law Governs Right to Contribution or Indemnity Between Tortfeasors*, 95 A.L.R.2d 1096, 1102 (1964).

contribution laws.¹⁵⁸ If counsel are fortunate, both tortfeasors will be domiciled in the same state, a status giving that state "the greatest interest in the issue of contribution."¹⁵⁹ In air crash litigation, however, the contribution parties are not likely to share the same domicile. Alternatively, contribution problems might be reduced if the interested states have adopted the Uniform Contribution Among Tortfeasors Act of 1939¹⁶⁰ and the 1955 Revised Act.¹⁶¹ Most likely, however, counsel would have to grapple with a subject which does not yield even the relatively satisfactory solutions which choice-of-law sometimes permits. The problem exists in regard to substance as well as procedure—to the extent that the two can be separated at all.

Although it is difficult to discern a legitimate purpose in state laws which forbid the equitable division of liability among defendants responsible for the injury, a number of states either do just that or very narrowly limit the right of contribution.¹⁶² It is similarly hard to make a reasoned choice among potentially crucial differences in states' prerequisites for recovering contribution.¹⁶³ A party involved in complex litigation following an air crash, for example, will want to be sure that settlement will not

¹⁵⁸ "The existence of a contractual right to indemnity, and the rights created thereby, are determined by the law selected by application of the rules of §§ 187-188." RESTATEMENT, *supra* note 6, § 173, cmt. b.

¹⁵⁹ See *id.* § 173, cmt. a.

¹⁶⁰ UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, § 12 U.L.A. 57 (1939). Eight states, Arkansas, Delaware, Hawaii, Maryland, New Mexico, Pennsylvania, Rhode Island and South Dakota, still adhere to versions of the Uniform Contribution Among Tortfeasors Act of 1939. However, even if the interested states are among this list, counsel must carefully compare their versions of the Act for uniformity, because many adopting states made important changes.

¹⁶¹ UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 1955 Revised Act, § 12 U.L.A. 63 (1955). Eleven states, Arizona, Colorado, Florida, Massachusetts, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, and Tennessee, enacted versions of the 1955 Revised Uniform Contribution Among Tortfeasors Act, but once again, counsel must check carefully for conflicts.

¹⁶² See the state-by-state review of tort laws in DEFENSE RESEARCH INSTITUTE, *supra* note 12. For a brief historical review of contribution and its unsatisfactory treatment in the United States, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 50, at 336-41 (5th ed. 1984).

¹⁶³ Particular state rules can be decisive. Compare, for example, the following:

jeopardize its contribution rights and that its settlement procedure and releases are in a form which permits the later recovery of contribution from its co-defendants.¹⁶⁴ In a state where contribution is a common-law right, it is likely that the procedural prerequisites for contribution

Restrictive Prerequisites To Contribution

In order to recover contribution in Illinois when there is an underlying tort action, the defendant seeking contribution *must* make its claim during that action's pendency. *Laue v. Leifheit*, 473 N.E.2d 939, 941-42 (Ill. 1984). This rule holds even when the tort cause of action is settled rather than tried, other claims are tried only as to the issue of damages after liability is admitted. *See Arkansas Best Freight Sys., Inc. v. Illinois News Serv., Inc.*, 512 N.E.2d 1063, 1065 (Ill. App. Ct. 1987). The filing of counterclaims for contribution after the parties have rested their cases does not fulfill the requirement of filing during the underlying tort action's pendency. *Henry v. St. John's Hosp.*, 563 N.E.2d 410, 416-17 (Ill. 1990), *cert. denied*, 111 S. Ct. 1623 (1991).

In *Kantlehner v. United States*, 279 F. Supp. 122 (E.D.N.Y. 1967), the court declined to apply the contribution law of Maryland, the fortuitous situs of the air crash in which the plaintiff's decedent was killed. Instead, the court applied the contribution law of New York, the decedent's residence, the home base of the aircraft, and the domicile of one of the third-party defendants. *Id.* at 127. Unfortunately, however, the contribution claim was foreclosed by New York's requirements that a joint judgment must be entered and the defendant seeking contribution must have paid more than its pro rata share. *Id.* The court chose New York law in part because it found that its requirements exhibited a policy favoring New York plaintiffs: "One purpose [of the requirements] is to give New York plaintiffs the right to commence and prosecute their actions, and to satisfy any judgment that they may be awarded, without having to contend with undue interference or delay resulting from controversies among their adversaries." *Id.* at 127. It is difficult, however, to see how New York's requirement of joint judgment makes the plaintiff's recovery any easier than it would be if, for example, he recovered a judgment against a single tortfeasor and left the joint tortfeasors to fight among themselves. Such stretching might perhaps be more understandable if the object were to designate the law of a state which permitted contribution.

A More Liberal Approach

IOWA CODE ANN. § 668.5 (West 1987) permits a right of contribution to be "enforced either in the original action or by separate action brought for that purpose." *Id.*

¹⁶⁴ New Mexico and Texas impose restrictions upon settling tortfeasors' right to contribution. *See* N.M. STAT. ANN. § 41-3-2 (Michie 1978); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 819 (Tex. 1984).

Illinois, for example, requires the settlement release to discharge the liability of the non-settling party who contributed to the injury. ILL. ANN. STAT. ch. 70, § 302(e) (Smith-Hurd 1989). California, on the other hand, appears to permit a settling tortfeasor to sue a concurrent tortfeasor whose liability has not been extinguished. *See Sears Roebuck & Co. v. International Harvester Co.*, 147 Cal. Rptr. 262, 264-65 (Cal. Ct. App. 1978); *Bolamperti v. Larco Mfg.*, 210 Cal. Rptr. 155, 159 (Cal. Ct. App. 1985); *Mullin Lumber Co. v. Chandler*, 230 Cal. Rptr. 122, 124 (Cal. Ct. App. 1986).

will be governed by the forum.¹⁶⁵ However, if the choice of law falls upon a statute conferring contribution rights, it is likely that the procedures included in the statute would be considered inseparable from the substantive right itself.¹⁶⁶ This conclusion could impose significant restrictions upon the recovery of contribution even when the law of a state which permits contribution is chosen. For example, since Iowa Code section 668.5 states that the "basis for contribution is each person's equitable share of the obligations, including the share of fault of a claimant [that is, the plaintiff], as determined in accordance with section 668.3,"¹⁶⁷ the detailed calculation of

¹⁶⁵ See, e.g., *First Nat'l Bank in St. Petersburg v. Hoffman*, No. 60090, 1991 WL 18686 at *1 (Ohio App. Feb. 14, 1991), jurisdictional motion *overruled* by 574 N.E.2d 1092 (Ohio 1991), in which the court, citing Restatement Sections 122 and 131, affirmed the trial court's ruling that Ohio's requirement of a separate action for contribution prevailed over Florida's rule authorizing a judgment assignee to obtain contribution in the same action in which the judgment was obtained. See also *Perez v. Short Line Inc.*, 231 A.2d 642, 642-43 (Del. Super. Ct. 1967), *aff'd*, 238 A.2d 341 (Del. 1968) a pre-Restatement (Second) case in which the court, citing, *inter alia*, § 585 of the first Restatement, held that Delaware's categorization of contribution as a "matter of remedy" foreclosed any consideration of Delaware's and Pennsylvania's conflicting rules and mandated the application of the law of the forum. Section 122 of the Restatement (Second) does not speak in terms of "remedy" but deals with "Issues relating to Judicial Administration," which, in comment a's terms, are issues "relating to judicial administration, such as the proper form of action, rules of discovery, mode of trial and execution and costs." RESTATEMENT, *supra* note 6, § 122.

¹⁶⁶ In *Maryland v. Capital Airlines, Inc.*, 280 F. Supp. 648, 650 (S.D.N.Y. 1964), for example, the court rejected the law of the place of injury, Maryland, in favor of the law of New York, the place most closely associated with the contractual dealings of the parties to the contribution suit. The contribution-plaintiff's claim succumbed to New York's prerequisite that a joint judgment be rendered against the contribution plaintiff and defendant and that the contribution plaintiff has paid more than his pro rata share.

¹⁶⁷ IOWA CODE ANN. § 668.5 (West 1987). Among the requirements of § 668.3, for example, is the answering of special interrogatories or findings concerning:

- a. The amount of damages each claimant will be entitled to recover if contributory fault is disregarded;
 - b. The percentage of the total fault allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under section 668.7.
- For this purpose the court may determine that two or more persons are treated as a single party. In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party and the extent of the causal relation between the conduct and the damages claimed.

Id. § 668.3.

comparative fault prescribed in Iowa Code section 668.3 might be considered essential to the right to contribution under Iowa's statute.¹⁶⁸

*Consolidated Rail Corp. v. Allied Corp.*¹⁶⁹ illustrates the difficulty of solving contribution conflicts under the present requirement that federal courts apply the choice rules of the states in which they sit. In *Consolidated Rail*, Conrail sued Allied Corporation for contribution on settlements Conrail made following a chemical leak from a Conrail car that injured a number of people in Elkhart, Indiana. Allied had unloaded the toxic chemicals from the car in Illinois and had labeled the car as empty. Even though Indiana's *lex loci* rule prohibited contribution, and even though Illinois, where Allied had unloaded the chemicals and mislabeled the car as empty, permitted contribution, the Seventh Circuit held that Conrail's acts within Indiana gave that state sufficient contact with the contribution litigation to impose its own law forbidding contribution.

Initially, the court recognized the error of considering contribution as having any relationship with the underlying tort other than the equitable division of the liability arising from it.¹⁷⁰ In the absence of any request for application of a different rule, however, the court apparently felt obliged to analyze the choice-of-law problem under Indiana choice-of-law for torts¹⁷¹ which applies the law of

¹⁶⁸ See *Iowa Nat'l Mut. Ins. Co. v. Granneman*, 438 N.W.2d 840, 842 (Iowa 1989) (enforcing the statute's one-year statute of limitations) and *Baldwin v. City of Waterloo*, 372 N.W.2d 486, 492-93 (Iowa 1985) (enforcing the statute's definition of parties).

¹⁶⁹ 882 F.2d 254 (7th Cir. 1989).

¹⁷⁰ The court stated:

We cannot agree that the proper focus is on the underlying tort and thus disagree that the injuries and losses to Elkhart citizens give Indiana a significant contact with *this* litigation. The current litigation involves only a question of who will bear the ultimate financial responsibility for the damages arising from the chemical leak. The citizens of Elkhart, who have already been made whole, have no interest in this case.

Id. at 257.

¹⁷¹ The court noted that an action for contribution "is based on equitable principles, in the nature of unjust enrichment, resulting from an overpayment by one of a group of tortfeasors Thus, it might be sensible to apply the law of the

the accident situs as long as it has a significant contact to the litigation.¹⁷² The court concentrated on the basis of Conrail's underlying liability because, under Indiana law, whether or not the place of the tort has a significant contact with the litigation depends in large part on the theory of recovery propounded in the litigation—here the underlying personal injury causes. The court ruled that the Indiana residents' strict liability claims against Conrail supported Conrail's contribution claim and "inexorably tie[d] this action to Indiana."¹⁷³ The court held that since the escape of the abnormally dangerous gas in Indiana constituted a significant contact with the contribution litigation, Indiana required the application of the *lex loci delicti* and the consequent failure of Conrail's claim.

This result is completely unsatisfactory because the underlying tort is not the proper focus of the contribution inquiry which should be confined solely to the dividing of liability which has already been determined.¹⁷⁴ In addition, even if conduct, rather than the division of liability, were the proper focus of the choice of law analysis, the

state where the overpayment occurred resulting in the unjust enrichment." *Id.* at 256. Nevertheless, the court followed the majority approach of applying the tort choice-of-law rule since neither party argued for a different rule.

¹⁷² The court explained that Indiana's choice of law rule for torts was that: the *lex loci delicti* rule will be applied only where the place of the tort has a significant contact to the legal action Where the contact with the place of the tort is insignificant, then the court must consider other factors such as:

- 1) the place where the conduct causing the injury occurred;
- 2) the residence or place of business of the parties; and
- 3) the place where the relationship is centered.

Id.

¹⁷³ *Id.* at 258.

¹⁷⁴ Of course, if the state of the party against whom contribution is sought forbids the particular cause of action upon which the contribution-seeker bases its claim, perhaps it would make sense to say that state would have an interest in preventing its policy from indirect erosion by successful contribution claims arising from the prohibited cause of action. But *Consolidated Rail* presented no such situation. In the first place, the court did not discuss Conrail's theory of Allied's liability. Furthermore, both Illinois and Indiana recognize the strict liability action upon which Conrail relied in its contribution claim. The court's speculation is perplexing, since a mechanical application of the law of the state when overpayment was made would surely not guarantee an equitable result.

conduct of the contribution defendant (Allied) would seem to be at least as important for consideration as the basis for the contribution plaintiff's (Conrail's) liability. The inequity of applying Indiana's rule to this case is manifest. Allied escaped contribution liability even though it was the one that emptied the car and labeled it as empty, and even though Conrail's liability was based on liability without fault. Shackled by the necessity to apply Indiana's rule, the court did not bother to discuss the significance of Illinois' contact with the negligent unloading and subsequent mislabeling—Allied's conduct, which supported Conrail's contribution claim.

Contribution is a very different kind of issue from, for example, the issue of punitive damages in which a state's denial of such damages represents an interest in protecting defendants from undue economic burden. This interest is just as great as the interest in deterrence embodied by the opposite rule. Section 173 of the Restatement, provides a solution which, if not inherently satisfying, at least solves the problem: "The law selected by application of the Rule of § 145 [which sets forth the contacts to be considered to determine which law controls a given issue] determines whether one tortfeasor has a right to contribution or indemnity against another tortfeasor."¹⁷⁵ Comment (a) of section 173 provides in part:

The state where conduct and injury occurred will not by reason of these contacts alone be the state that is primarily concerned with the question whether one tortfeasor may obtain contribution against another. *The local law of this state will, however, be applied unless some other state has a greater interest in the determination of the particular issue.*¹⁷⁶

¹⁷⁵ RESTATEMENT, *supra* note 6, § 173.

¹⁷⁶ *Id.* cmt. a (emphasis added). Frequently, the question of how to determine the place of wrong is vague enough when the question concerns the defendants' underlying liability itself. In the context of contribution, the question resists the formulation of any reasonable approach to the issue.

When the issues concern the defendant's or defendants' primary liability, determining the place of the wrong is directly concerned with conduct. The importance to liability issues to the state whose interest is identified by this determination derives from that state's desire to affect behavior or protect busi-

VII. CONCLUSION

Choice-of-law problems may occasionally seem as abstruse as determining the number of angels who can dance on the head of a pin or whether, in going from one extreme to another, an angel must pass through the middle. It is hoped that the approaches to particular problems, whether they are hypothetical or, as in the case of punitive and compensatory damages, substantially researched, demonstrate that the resort to basic considerations will yield not only comforting reference points, but frequently eminently defensible solutions—like the sensible dominance of the injured party's domicile on the question of compensatory damages. In any choice-of-law struggle it is important to probe for the essentials of the particular problem at hand. In mass-disaster, multi-claimant litigation, in which a number of choice issues may arise, it is crucial for attorneys to establish a pattern of sensible arguments, even when the application of such arguments to individual claims does not uniformly favor their clients. Only by doing so will litigants avoid charges of opportunistically manipulating a suspect discipline as well as the debilitating sense on their own part that such a charge may not be unfounded.

ness conducted within its borders. By the time the primary plaintiff is made whole by one or more of the defendants, the defendants' conduct toward the plaintiff should no longer be relevant. See *Consolidated Rail Corp. v. Allied Corp.*, 882 F.2d 254, 257 (7th Cir. 1989); *Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*, 465 F. Supp. 790, 799 (S.D.N.Y. 1978), *aff'd*, 617 F.2d 936 (2d Cir. 1980). Indeed, unless a contribution recovery would violate some legitimate policy of an interested state, the only relevant question about conduct would appear to be the determination of the tortfeasors' proportionate share of causation. Such a quantification is unrelated to modifying or protecting conduct.

Thus, the locale of the tortfeasors' conduct has no rational connection to their *rights* to contribution. The frequent statement that the rationale for looking toward the place of the wrong for contribution law is that contribution is a derivative action does not explain satisfactorily the relevance of the place of the wrong's law to contribution. See, e.g., *Seitter v. Schoenfeld*, 678 F. Supp. 831, 837 (D. Kan. 1988). Thus, the Restatement's default to the familiar rule of tort choice-of-law may simply constitute an expedient escape from the difficulty of making a rational choice.